LIBRARY
SUPREME COURT, U. S.

FILED
AUG 19 1969
JOHN F. DAVIS, CLERK

No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al.,
Petitioners,

v.

W. O. HILTON, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 12TH SUPREME JUDICIAL DISTRICT OF TEXAS AT TYLER

JACK W. FLOCK,
TOM B. RAMEY, JR.,
FRANK L. McCLENDON,
Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Petitioners.

Of Counsel:

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10545 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	6
Constitutional Provisions, Statutes and Rules	8
Statement	11
Reasons Why Writ Should Be Granted	16
Conclusion	20
Appendix is under separate cover filed herewith	20

Page

Cases

Braniff Airways v. Nebraska State Board of Equalization, 347 U.S. 590, 599, and 98 L. Ed. 967, 977 19

Donohue v. Vosper, 243 U.S. 59, 64 and 61 L. Ed. 592, 596 17

Hammerstein v. Superior Court of State of California, 340 U.S. 622, 623, and 95 L. Ed. 586, 587 18

Knights of Pythias v. Meyer, 265 U.S. 30, 33, and 68 L. Ed. 885, 888 17

Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 and 58 L. Ed. 1245, 1253 18

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 19

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128, and 89 L. Ed. 2092, 2100 20

Raley v. State of Ohio, 360 U.S. 423, 436-7, and 3 L. Ed. 2d 1344, 1354 19

Stoll v. Gottlieb, 305 U.S. 165, 167, 170-174, 175 and 83 L. Ed. 104, 106-108, 110 17

Constitutional Provisions

Constitution of U. S., Art. IV, Sec. 1 8

Fifth Amendment to U. S. Constitution 10

Fourteenth Amendment to U. S. Constitution 10

Statutes

Federal Statute 28 U.S.C. Sec. 1257 8

Federal Statute 28 U.S.C. Sec. 1738 8

Federal Statute 28 U.S.C. Sec. 2072 10

Federal Civil Procedure Rules

Rule 16 9

Rule 81(c) 9

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al.,

Petitioners,

v.

W. O. HILTON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 12TH SUPREME JUDICIAL DISTRICT OF TEXAS AT TYLER

Atlantic Richfield Company, previously known as The Atlantic Refining Company, and John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Fredrick J. Herschbach, and Robert A. Herschbach, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the 12th Supreme Judicial District of Texas at Tyler, and the judgment of the Supreme Court of Texas refusing writ of error on ground of no reversable error.

OPINIONS BELOW

(1) Opinion of U. S. Court of Appeals 5th Circuit in *W. O. Hilton et al., Appellants v. The Atlantic Refining Company, Appellee* is reported in 327 F. 2d 217. Opinion printed Appendix A pps. 1-4.

(2) Opinion of Court of Civil Appeals for 12th Supreme Judicial District of Texas in *Atlantic Richfield Company et al., Appellants v. W. O. Hilton et al., Appellees* is reported in 437 S.W. 2d 347. Opinion printed Appendix B, pps. 5-21.

JURISDICTION

1. Judgment of the state Court of Civil Appeals in 437 S.W. 2d 347 was entered on January 30, 1969. Timely motions for rehearing filed on February 12, 1969 were denied on February 20, 1969 (Appendix Z, pps. 111-118 and Appendix Z-1, pps. 119-120). Application for writ of error timely filed on March 19, 1969 (Appendix Z-2, pps. 121-124) was refused on May 7, 1969 by Supreme Court of Texas on the ground of no reversable error (Appendix C, pps. 22-23), and timely motion for rehearing filed on May 22, 1969 (Appendix Z-3, pps. 125-127) was denied on June 11, 1969 (Appendix C, pps. 22-23). The state court judgment became final on June 11, 1969 and is now subject to Order dated June 26, 1969 of state Court of Civil Appeals staying the mandate and enforcement of same pending action taken by this Court on this Petition (Appendix D, pps. 24-25).

2. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The state Court of Civil Appeals in 437 S.W. 2d 347, 351 (Appendix B, pps. 9-11) held directly

contrary to the prior Opinion in this case in U. S. 5th Circuit Court in 327 F. 2d 217, 219 (Appendix A at p. 3 under (2)) in that:

Atlantic, as sole defendant and citizen of Pennsylvania, removed case to U. S. District Court on diversity of citizenship (Appendix F, pps. 29-32), and said court denied Respondents' motion to remand to make parties defendant destroying diversity (Appendix H, pps. 35-36). Pre-trial Order including stipulations of parties were made in and approved by said Court that Atlantic's oil and gas lease was in production and pooled, and contested issues related to sufficiency of lease description (Appendix I, pps. 37-59. See pps. 40, 42-45 and 54-57). After judgment on merits in favor of Atlantic (Appendix K, pps. 64-66) Respondents appealed from Order denying remand and designated pre-trial order including stipulations and findings of fact and conclusions of law of Federal District Court as part of record for their appeal (Appendix L, pps. 67-68). Judgment of the U. S. 5th Circuit Court in 327 F. 2d 217, 219 (Appendix A at pps. 1-4) was entered on January 9, 1964, holding (Appendix A p. 3) the royalty owners were indispensable parties "because if the lease were removed from the unit for want of sufficient description, the lease would terminate for lack of production, *since it is presently held enforced by production within the unit, but off the lease*", and "*since it would no longer be validly unitized*", and said royalty owners "would be denied their present rights to royalties." The Court then held since joinder of these indispensable parties would result in a jurisdictional defect which is cause

for remand, that judgment be reversed with directions to remand to the state court. (Emphasis added). Rehearing was denied February 19, 1964 (Appendix A, pps. 1-4).

Judgment of state Court of Civil Appeals in 437 S.W. 2d 347, 351 was entered on January 30, 1969 wherein court held directly contrary to U. S. 5th Circuit Court and U. S. District Court by holding said stipulations involved only a question of law and were not binding on the court or parties, and "since the stipulated issues before the Federal Court involved only a question of law" Respondents "were not barred from amending their pleadings and proving that as a matter of law, the Atlantic-Hilton lease had terminated because of improper exercise of the pooling privilege" under the doctrine announced in a state court decision made over three years subsequent to said stipulations and subsequent to the U. S. 5th Circuit Court decision. Motion for rehearing was denied on February 20, 1969 (Appendix B pps. 5-21. See pps. 9-11).

3. Federal questions were raised as shown in said state Court of Civil Appeals Opinion 437 S.W. 2d 347, 351 (Appendix B pps. 5-21. See 9-11), where it is recited while the case was pending in Federal Court written stipulations were made and entered in open court, and included Respondents stipulation the issues related to sufficiency of lease description; that upon remand to state court Petitioners herein contended said stipulations are binding contracts in full force and Respondents should not be permitted to assert Atlantic exceeded its authority to pool or that said tracts were not pooled; and contended further Respondents are

not entitled to recover on an assertion directly opposite to that upon which Respondents recovered judgment against Atlantic in Federal Court; and that Petitioners points of error involve the effect of the stipulations in the Pre-trial Order. Petitioners' said points were overruled by the state court which held directly opposite to U. S. 5th Circuit Court by holding the stipulations were not binding on either the court or the parties, and that Atlantic's lease was not in production or pooled. (Appendix B pps. 5-21. See pps. 9-11).

Petitioners again raised the Federal questions by Points of Error Nos. 1-15 and No. 40 assigned in their motions for rehearing in state Court of Civil Appeals (Appendix Z pps. 111-118, and Appendix Z-1 pps. 119-120), and all of which were overruled in said Court's opinion.

Said Federal questions were again raised by Petitioners Points of Error Nos. 1, 2, 3, 4 and 13 in their application for writ of error in Supreme Court of Texas (Appendix Z-2, pps. 121-124), which was overruled by said Court refusing same on ground of no reversable error (Appendix C, pps. 22-23).

Said Federal questions were again raised in Petitioners Assignment of Errors Nos. I, III and V in their motion for rehearing filed in Supreme Court of Texas (Appendix Z-3, pps. 125-127), which were overruled by said Court on June 11, 1969 (Appendix C, pps. 22-23).

Since the state Court of Civil Appeals has expressly considered and determined the Federal questions as above stated, it is not considered to be here necessary to set forth

in detail the manner in which Petitioners raised said questions in defense of the suit in State District Court and in State Court of Civil Appeals. However in the event the Court should be of the opinion same is required, reference is here made to below paragraph 10 of Statement Material To Consideration Of Questions Presented.

4. Authorities are cited below under Reason Why Writ Should Be Granted.

QUESTIONS PRESENTED

Stipulations were made in and approved by the Federal Court that Atlantic's lease was in production and pooled and the contested issues related to sufficiency of lease description. The stipulations were designated by Respondents as a part of record for appeal from Order denying remand to state court, and were acted upon by U. S. 5th Circuit Court in holding that since Atlantic's lease was in force by production and unitization, the royalty owners in the pooled unit were indispensable parties and this required the U. S. District Court judgment on merits in favor of Atlantic be reversed and case be remanded to state court. The state court then held directly to contrary that the stipulations were invalid as involving a question of law and were not binding on the court or parties and declared Atlantic's property rights under the lease terminated.

The questions presented are:

1. Whether the state court denied Petitioners a right arising under the authority of the United States by hold-

ing the stipulations of the parties approved and acted upon by the Federal Court as the basis for the reversal and remand, were not binding on the state court or parties after remand?

2. Whether Petitioners were denied a right under Art. IV, Sec. 1 of the U. S. Constitution and 28 U.S.C. Sec. 1738 in that the state court refused to give full faith and credit to the approval of the stipulations by the Federal Court and to the judgment of the U. S. 5th Circuit Court based on same?

3. Whether Petitioners by the state court judgment were denied federally created rights under the stipulations approved by the U. S. District Court under Federal Civil Procedure Rules 16 and 81(c) authorized by 28 U.S.C. Sec. 2072 and acted upon by the U. S. 5th Circuit Court as the basis for the reversal and remand to state court?

4. Whether the state court denied Petitioners due process and equal protection of law under the 14th and 5th Amendments to the U. S. Constitution, by the state court judgment terminating Petitioners' property rights in contravention of the stipulations approved and acted on by the Federal Court?

5. Whether the state court denied Petitioners due process and equal protection of law under the 14th and 5th Amendments to the U. S. Constitution in that after the Federal Court held against Atlantic *because the lease was in production and pooled,* (as stipulated), the state court then held against Atlantic by holding the Stipulations invalid and *because of this the lease was not in production or pooled?*

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT UNDER WHICH PETITIONERS WERE DEPRIVED OF THEIR RIGHTS

(1) Federal Statute 28 U.S.C. Sec. 1257 provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"
>
> (1) and (2) — not here pertinent.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(2) Article IV, Sec. 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

(3) Federal Statute 28 U.S.C. Sec. 1738 provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts

within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(4) Federal Civil Procedure Rule 16 provides in pertinent part:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) the simplification of the issues;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(6) such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

(5) Federal Civil Procedure Rule 81(c) provides in pertinent part:

"These rules apply to civil actions removed to the U. S. district courts from the state courts and govern procedure after removal."

(6) Federal Statute 28 U.S.C., Sec. 2072 provides in pertinent part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

(7) The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(8) The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "; nor shall any person * * * be deprived of life, liberty or property, without due process of law;"

STATEMENT MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED

1. Suit involves oil and gas lease on 82.713 acres in Fairway Oil Field in Henderson County, Texas. Respondents executed lease which was assigned to Petitioner Atlantic. On November 22, 1961, Respondents, citizens of Texas, filed suit in state court against Petitioner Atlantic, citizen of Pennsylvania, as sole defendant to remove as cloud on title unit declaration for a 160 acre oil unit filed by Atlantic under said lease, and which lease Respondents claimed to be invalid because of a lack of sufficient description of land. (Appendix E, pps. 26-28).

2. Atlantic on diversity of citizenship removed suit to U. S. District Court (Appendix F, pps. 29-32). Respondents filed motion to remand to state court on ground their suit affected interests of royalty owners in the pooled unit who Respondents had not made parties, and who Respondents asserted were indispensable parties whose joinder would destroy diversity and jurisdiction of Federal Court. (Appendix G, pps. 33-34).

3. U. S. District Court denied the motion to remand, and on pre-trial hearing Atlantic and Respondents entered into written stipulations which were approved by the court, and whereby it was agreed Atlantic had drilled a producing oil well within the pooled unit but off the lease, and had made the declaration of unit "whereby a 160 acre unit was formed for the production of oil" and "whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly 80 acres from the

W. O. Hilton, et al, lease making the total of 160 acres," and whereby it was stipulated the remaining 2.713 acres "has been pooled as a part of" a 160 acre oil unit on the South, and it was further stipulated the contested issues related to the sufficiency of the land description in the lease. (Appendix I pps. 37-59, See pps. 40, 42-45 and 54-57).

4. U. S. District Court then heard the case on its merits without a jury and concluded said lease was valid and subsisting, that Respondents had ratified same and ownership of Atlantic, and had estopped themselves to contest validity of same as well as ownership of Atlantic, and that the declaration of unit was valid and in full effect. (Appendix J pps. 60-63). The Court reciting it had considered the pleadings, pre-trial stipulations, pre-trial order, and the evidence, rendered judgment that Respondents recover nothing and that Petitioner Atlantic recover the title and possession of the subsisting oil and gas leasehold estate. (Appendix K pps. 64-66).

5. Respondents appealed to U. S. 5th Circuit Court from Order denying remand and said court held that while denominated a suit to remove cloud, the claim of Respondents' suit was that the oil and gas lease was invalid for lack of sufficient description. The theory of Respondents was that if the lease was invalid for lack of a sufficient description, then Atlantic had no lease and no authority to pool. Respondents in their Designation of the Record for their Appeal included the Pre-Trial Order containing the above stipulations, and the Findings of Fact and Conclusions of Law by U. S. District Court. The U. S. 5th Circuit Court

held the royalty owners were indispensable parties "because if the lease were removed from the unit for want of sufficient description, the lease would terminate for lack of production, *since it is presently held enforced by production within the unit but off the lease,*" and if Respondents "won the suit and reentered, the lease would terminate *since it would no longer be validly* unitized." (Emphasis added). (Appendix A pps. 1-4 at p. 3).

6. U. S. 5th Circuit Court then held that since joinder of the royalty owners would destroy diversity of citizenship resulting in a jurisdictional defect, that the judgment must be reversed with directions to remand to state court. The case was remanded to state court on March 24, 1964. After remand on April 20, 1967 Respondents amended their pleadings making the royalty owners defendants for first time, and for first time acknowledged lease description was valid, but then alleged for first time that Atlantic had exceeded its authority under said lease to pool or unitize, and there never having been a well drilled on or production had from a well drilled on the 82,713 acres that Atlantic's lease terminated. Said amended pleadings while naming the royalty owners as defendants alleged the title to the "royalty interest is not an issue in this action" and excepted same from any recovery by Respondents for title and possession. (Appendix M pps. 69-77).

7. Respondents filed motion for summary judgment. Petitioners filed amended answers and motions for summary judgment including the defenses plead by reason of the

stipulations and judgments in Federal Court. (Appendix N pps. 78-88, and Appendices O through V pps. 89-100).

8. The state district court granted Respondents judgment holding the lease owned by Atlantic was not in production and not unitized by reason of which it had terminated, and that the alleged cloud cast on Respondents' title by the declaration of unit by Atlantic be removed, and that Respondents recover title and possession of the mineral fee estate except as to the royalty interest not in issue. (Appendix W pps. 101-105).

9. The state Court of Civil Appeals affirmed said judgment holding the stipulated issues before the Federal Court involved only a question of law and were not binding on the Court or parties, and Respondents were not barred on remand to state court from amending and proving that as a matter of law the lease had terminated because of improper exercise of the pooling privilege. Said court then overruled Petitioners' points of error relating to the defenses urged by reason of the stipulations and the judgment of the U. S. 5th Circuit Court remanding the case. (Appendix B pps. 5-21. See pps. 9-11).

10. Under Jurisdiction under 3. above, it is believed a complete statement has been made as to the stage in the proceedings and the manner in which the Federal questions sought to be reviewed were raised and based on. In the event the recitation of the state Court of Civil Appeals in its opinion and what is stated above is not considered complete then reference is made to the special exception and special pleadings of said stipulations and federal court

judgment as defenses in Paragraphs 1, 6, 7 and 8 of Atlantic's Third Amended Answer in state district court (Appendix N pps. 78-88); and Paragraph 1. in the Answers of the royalty owners filed in state court including their adoption of the Answer filed in behalf of Atlantic (Appendices O through T pps. 89-94), and all of which were overruled by the state District Court judgment in favor of Respondents (Appendix W pps. 101-105).

Further reference is made to Paragraph 2, Subsections (2), (3) and (4) of Atlantic's motion for summary judgment in state district court including the attached Exhibit No. 15 being copy of Opinion of the U. S. 5th Circuit Court, and Exhibit No. 16 being copy of pre-trial order and stipulations approved by U. S. district court (Appendix U pps. 95-98); and motion for summary judgment by royalty owners John W. Melton et al. filed in state district court adopting the motion and Exhibits filed by Atlantic (Appendix V pps. 99-100); and which said motions were overruled by the state district court judgment in favor of Respondents (Appendix W pps. 101-105); reference is further made to Points of Error Numbers 1, 2, 3 and 7 made in Atlantic's brief in state Court of Civil Appeals urging the stipulations and 5th Circuit Court judgment as defenses (Appendix X pps. 106-108); and the adoption by royalty owners John W. Melton et al. of points of error made in Atlantic's brief filed in state Court of Civil Appeals (Appendix Y pps. 109-110); and all of which points were overruled in the state Court of Civil Appeals opinion (Appendix B pps. 5-21. See pps. 9-11).

REASONS WHY WRIT SHOULD BE GRANTED

1. Substantial and far reaching federal questions are presented because if the state court judgment is allowed to stand then state courts can hold the grounds acted on by federal courts as the basis for judgment to be invalid and not binding on the state court or the parties. The effect would be to undermine the integrity of all federal court judgments not concurred in by the state court, leaving them naked decisions without any stated basis in law or fact, and raising questions as to whether such judgments should be considered of any force or effect.

2. The action at the time of removal was one as to which U. S. District Court had original jurisdiction, 28 U.S.C. Sec. 1441(a). Subsequently question of remand to make additional parties to destroy diversity of citizenship was raised by Respondents. This federal question was decided by the federal court judgment based on what was stipulated by the parties under approval of federal court that the lease was in production and pooled, subject to sufficiency of lease description. Holding by U. S. 5th Circuit Court that its decision was made because lease was in production and pooled was an element in favor of and under which Petitioners claim. The state court allowed Respondents to repudiate the stipulations and refused to give effect to the stated basis for the judgment of the Federal Court. The stipulations made in and approved by federal court did not become a subject of dispute until repudiated by Respondents in state court. U. S. Supreme Court has jurisdiction to review the state court decision as involving a denial of a title

or rights claimed under authority exercised under United States. See *Donohue v. Vosper*, 243 U.S. 59, 64 and 61 L. Ed. 592, 596.

3. Jurisdiction to determine effect given approval of stipulations by Federal District Court, and effect to be given U. S. 5th Circuit Court judgment in state court is conferred on Supreme Court of United States by provisions of the Federal Constitution declaring supremacy of Constitution and extent of judicial power and authorizing legislation to make same effective. Art. IV Sec. 1 of U. S. Constitution, and 28 U.S.C., Sec. 1738. Approval of stipulations by Federal District Court and judgment of U. S. 5th Circuit Court are entitled to full faith, credit and effect in state court. Stipulations having been approved and acted on by Federal Court were valid in Federal Court and being valid in Federal Court were valid and binding on state court. Refusal of state court to give full faith and credit to said stipulations and U. S. 5th Circuit Court decision is reviewable in Supreme Court by writ of certiorari. *Stoll v. Gottlieb* 305 U.S. 165, 167, 170-174, 175 and 83 L. Ed. 104, 106-108, 110. Also *Knights of Pythias v. Meyer* 265 U.S. 30, 33, and 68 L. Ed. 885, 888.

4. Record leaves no doubt that rights under full faith and credit clause of U. S. Constitution were involved and necessarily passed on by state court's judgment stipulations and judgment of Federal Court were not binding on state court or parties. Supreme Court of United States has jurisdiction to review in such a case even if such rights had not been expressly asserted below because they were necessarily

passed on. It is not necessary to inquire how and when a Federal question was raised when it appears such question was actually considered and decided. *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134, and 5 L. Ed. 1245, 1253.

5. Parties had right to make stipulations and Federal Court had right to approve them under Federal Civil Procedure Rules and when made and approved a federal right was created which when acted upon by 5th Circuit Court basing its decision in accord with same, was not thereafter subject to being nullified by the state court. Federal Civil Procedure Rules 16 and 81(c), and 28 U.S.C., Sec. 2072. Since Petitioners defenses in state court were based on the assertion of their federal rights under the stipulations and 5th Circuit Court judgment the case is ripe for adjudication in the Supreme Court of United States. *Hammerstein v. Superior Court of State of California*, 340 U.S. 622, 623, and 95 L. Ed. 586, 587.

6. Atlantic was denied due process and equal protection of law in that after having the judgment on merits it had obtained in Federal District Court reversed by U. S. 5th Circuit Court and case remanded to state court because, as had been stipulated, Atlantic's lease was in production and pooled, the state court then held directly to the contrary that Atlantic could not recover because the stipulations approved and acted on by the Federal Court were not valid and binding on the state court or parties, and Atlantic's lease was not in production or pooled. U.S.C. Constitution of United States Amendments 14 and 5. The due process

and equal protection of law issues were within the clear intendment of and were sufficiently presented by Petitioners assertion of the stipulations and judgment in Federal Court as defenses to Respondents suit. *Braniff Airways v. Nebraska State Board of Equalization.* 347 U.S. 590, 599, and 98 L. Ed. 967, 977.

7. It affirmatively appears from the record that the federal questions as to the validity of the Federal Court approved stipulations and judgment were presented to the state Court of Civil Appeals, and that its decision on the federal questions was necessary to its determination of the cause. Otherwise the state court under said stipulations and judgment would have had to hold for Petitioners that the lease was in production and pooled. The state court in its Opinion recited the specific federal issues before it and then expressly considered and determined same, and in such case the Supreme Court of the United States does not inquire into framing of the issues in the first instance. *Raley v. State of Ohio,* 360 U.S. 423, 436-7, and 3 L. Ed. 2d 1344, 1354.

The federal questions and the grounds therefor were fairly brought to the state court's attention and this is shown by the record and being so are regarded as having been adequately presented. *New York ex rel. Bryant v. Zimmerman* 278 U.S. 63, 67.

8. The state court, by holding the Federal Court stipulations and judgment invalid and not binding on the state court or parties, exercised its jurisdiction in such a way that case could have been brought to Supreme Court of United

States had the questions been raised prior to original disposition. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128, and 89 L. Ed. 2092, 2100.

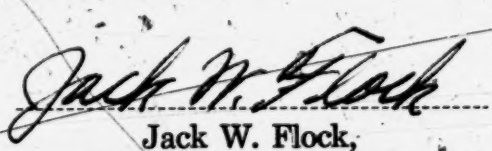
APPENDIX

Appendix is under separate cover filed herewith.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Jack W. Flock,
One of the Attorneys for Petitioners

Of Counsel:
RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
JACK W. FLOCK,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON,
Citizens First National
Bank Bldg.
P. O. Box 629,
Tyler, Texas 75701

CERTIFICATE OF SERVICE

This certifies that copies of this Petition for Writ of Certiorari have been served upon counsel of record for Respondents by enclosing copies in sealed envelopes and depositing same in the United States Post Office at Tyler, Texas, with first-class postage prepaid and sent by Certified mail, and addressed to counsel of record at their post office addresses as follows:

Mr. Edward Kliewer, Jr.,
Kliewer and Hood,
2210 Mercantile Bank Bldg.
Dallas, Texas 75201

Mr. Willis D. Moore,
Moore and Holland,
P. O. Box 392,
Athens, Texas 75751

Dated this 15th day of August, 1969.

Jack W. Flock

Jack W. Flock,
One of the Attorneys for Petitioners

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 19 1969
JOHN F. DAVIS, CLERK

No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al,
Petitioners,

v.

W. O. HILTON, et al,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JACK W. FLOCK,
TOM B. RAMEY, JR.,
FRANK L. McCLENDON,
Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701.

Of Counsel:
RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701.

P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130
THE WARLICK PRESS DIVISION, STECK-WARLICK CO.

INDEX TO APPENDIX

Page

Appendix A

Opinion Of United States Court of Appeals, 5th Circuit In W. O. Hilton, Et Al, Appellants v. The Atlantic Refining Co., Appellee, Reported In 327 F. 2d 217, Rendered Jan. 9, 1964, Rehearing Denied Feb. 19, 1964 1

Appendix B

Opinion Of Court Of Civil Appeals Of Texas, 12th Supreme Judicial District In Atlantic Richfield Company, Et Al, Appellants v. W. O. Hilton, Et Al, Appellees, Reported In 437 S.W. 2d 347, Rendered Jan. 30, 1969, Rehearing Denied Feb. 20, 1969 5

Appendix C

Order Of The Supreme Court Of Texas In Which Application For Writ Of Error Was Refused On The Ground There Was No Reversable Error 22

Appendix D

Order Granting Motion To Stay Mandate And Judgment Pending Petition For Writ Of Certiorari To The Supreme Court Of The United States 24

Appendix E

Plaintiffs W. O. Hilton Et Al Original Petition Filed In The District Court Of Henderson County, Texas 26

Appendix F

Petition For Removal From State Court To U. S. District Court Filed By Atlantic In U. S. District Court 29

Appendix G

Motion To Remand Of Plaintiffs W. O. Hilton, Et Al, In The U. S. District Court 33

Page

Appendix H

Order Of U. S. District Court Denying Plaintiff W. O. Hilton, Et Al's Motion To Remand To State Court 35

Appendix I

Pre-Trial Order Including Stipulations And Approval Of Parties, And Made And Entered In The U. S. District Court, And Designated By W. O. Hilton, Et Al, As Part Of The Record For Appeal To U. S. 5th Circuit Court 37

Appendix J

Findings Of Fact And Conclusions Of Law By U. S. District Court And Designated By W. O. Hilton, Et Al, As Part Of Record For Appeal To U. S. 5th Circuit Court 60

Appendix K

Decree And Judgment After Trial On Merits In The U. S. District Court 64

Appendix L

Designation Of Record For Appeal From U. S. District Court To U. S. 5th Circuit Court By W. O. Hilton, Et Al As Appellants 67

Appendix M

Plaintiffs W. O. Hilton Et Al Second Amended Petition Filed After Remand To State District Court 69

Appendix N

Third Amended Answer Of Defendant Atlantic Richfield Company After Remand To District Court Of Henderson County, Texas 78

Page

Appendix O

Defendants J. W. Melton And Wife Virgie Melton First Amended Answer 89

Appendix P

Defendant C. L. Hanna First Amended Answer 90

Appendix Q

Defendant Frances Walker McCain First Amended Answer 91

Appendix R

Defendant Edson Petroleum Company First Amended Answer 92

Appendix S

Defendants Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee For Empire Trust Company, And Empire Trust Company First Amended Answer 93

Appendix T

Defendants E. Fred Herschbach, Frederick J. Herschbach and Robert A. Herschbach First Amended Answer 94

Appendix U

Motion For Summary Judgment Of Atlantic Richfield Company In District Court of Henderson County, Texas 95

Appendix V

Motion For Summary Judgment By John W. Melton, Et Al, Filed In The District Court of Henderson County, Texas 99

Page

Appendix W

Judgment Entered By District Court of Henderson County, Texas After Remand 101

Appendix X

Points Of Error Nos. 1, 2, 3 and 7 Made In Brief Of Atlantic Richfield Company Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas 106

Appendix Y

Adoption By John W. Melton, Et Al Of Points Of Error Nos. 1, 2, 3 And 7 Made By Atlantic Richfield Company In Brief Filed In Court Of Civil Appeals, 12th Supreme Judicial District Of Texas 109

Appendix Z

Motion For Rehearing Of Appellant Atlantic Richfield Company Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas 111

Appendix Z-1

Motion For Rehearing Of Appellants John W. Melton, Et Al Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas 119

Appendix Z-2

Points Of Error Nos. 1, 2, 3, 4 and 13 In Application For Writ Of Error Filed In Supreme Court Of Texas By Petitioners Atlantic Richfield Company, Et Al 121

Appendix Z-3

Assignments Of Error Nos. I, III and V in Motion For Rehearing Filed In Supreme Court Of Texas By Petitioners Atlantic Richfield Company, Et Al 125

Certificate of Service 128

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al,
Petitioners,

v.

W. O. HILTON, et al,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

Opinion Of United States Court of Appeals, 5th Circuit In W. O. Hilton, Et Al, Appellants v. The Atlantic Refining Co., Appellee, Reported In 327 F. 2d 217, Rendered Jan. 9, 1964, Rehearing Denied Feb. 19, 1964.

Hutcheson, Circuit Judge:

This is an appeal from a ruling denying plaintiffs-appellants' motion to remand to the state court. The motion was based on the theory that there are certain indispensable parties, citizens of Texas, who could and, therefore, must

be joined as parties defendant and whose joinder would destroy diversity and, therefore, the jurisdiction of the federal court.

Appellants, Texas residents, filed suit in a Texas district court, naming it a suit for removal of a cloud on their title to a certain eighty acres.

While denominated a suit to remove cloud, the claim of plaintiffs' suit was that the oil and gas lease from appellants to appellee was invalid for lack of a sufficient description.

Appellee, a resident of Pennsylvania, removed to the federal court, where appellants moved to remand and appellee counterclaimed in trespass to try title, asserting ownership of a valid lease on the eighty acres.

Evidence on appellants' motion to remand was heard and denied, the case was decided against plaintiffs on the merits, and plaintiffs have appealed, asserting error in the refusal to remand.

(1) An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights. Typical of such equitable suits are suits to cancel or rescind, and the principle has been many times stated and applied.[1]

Of the opinion that a judgment for the plaintiffs would, because of the particular fact that the land was surrounded by producing leases and the judgment for plaintiffs would

[1] Mallow v. Hinde, 12 Wheat. 193, 6 L. Ed. 599; Shields v. Barrow, 17 How. 129, 15 L. Ed. 158; Sneed v. Phillips Pet. Co., 5 Cir., 76 F. 2d 785; Calcote v. Texas Pac. Coal & Oil Co., 5 Cir., 157 F. 2d 216, 167 A.L.R. 413; Hudson v. Newell, 5 Cir., 172 F. 2d 848; Hudson v. Newell, 5 Cir., 174 F. 2d 546.

not, therefore, practically injuriously affect the interest of the royalty owners, and concluding also that he should and would determine the case against plaintiffs' claim that the description was insufficient, the district judge denied the motion to remand. He then heard the claim and counter claim denying relief to appellants and granted judgment for the appellee.

Here appellee urges that the district judge did not err in holding that the non-participating royalty holders were not indispensable parties and, therefore, in refusing to remand.

(2) We cannot agree with this view. If, as a result of a decision in plaintiffs' favor, the lease would terminate, the non-participating holders would be denied their present rights to royalties under their lease. Such an effect constitutes them indispensable. Calcote v. Texas Pac. Coal & Oil Co., 5 Cir., 157 F. 2d 216, 167 A.L.R. 413. This is so because, if the lease were removed from the unit for want of sufficient description, the lease would terminate for lack of production, since it is presently held enforced by production within the unit, but off the lease. If appellants won the suit and re-entered, the lease would terminate since it would no longer be validly unitized.

(3, 4) Appellee urges that non-participating royalty holders are not indispensable parties to a trespass to try title suit. Ordinarily they are not, but if a judgment effectively precludes them from enforcing their rights and they are injuriously affected by the judgment, they are indispensable. Royal Petroleum Corp. v. Dennis, 160 Tex. 392, 332 S.W. 2d

313. Here a judgment for appellants in the suit, resulting in a termination of the lease, would have effectively prevented any future recovery by the non-participating royalty owners under that lease, and the district judge could not, by determining in advance that he would decide the case adversely to plaintiffs' claim, make indispensable, parties who would otherwise be indispensable. Hudson v. Newell, 5 Cir., 172 F. 2d at p. 852; Young v. Powell, 5 Cir., 179 F. 2d 147, at 151.

Since joinder of these indispensable parties would result in a jurisdictional defect, which is cause for remand under 28 U.S.C. §1447(c), the judgment must be reversed with directions to remand the cause to the state court.

Reversed with directions to remand.

APPENDIX B

Opinion Of Court Of Civil Appeals Of Texas, 12th Supreme Judicial District In Atlantic Richfield Co., Et Al, Appellants v. W. O. Hilton, Et Al, Appellees, Reported In 437 S.W. (2) 347, Rendered Jan. 30, 1969, Rehearing Denied Feb. 20, 1969.

Dunagan, Chief Justice.

This suit involves the question of whether an oil, gas and mineral lease executed by appellees, the Hiltons and McCoys, owners of the leasing privilege, to the predecessor in title of appellant, Atlantic, had terminated.

Appellees, W. O. Hilton and wife, Malvirin Hilton and L. A. McCoy and wife, Ila Mae McCoy, filed suit in November, 1961, against Atlantic Refining Company, now Atlantic Richfield Company, in the District Court of Henderson County, Texas, to remove as a cloud on title to an 82.713 acre tract, a part of a Unit Declaration for 160 acre oil unit filed by appellant, Atlantic, under an oil and gas lease executed by appellees, the Hiltons and McCoys, and which lease appellees claimed to be invalid because of a lack of sufficient description of land. Atlantic filed a counter claim against appellees, the Hiltons and McCoys, in the nature of a trespass to try title action. The case was removed from State Court to the U. S. District Court in Tyler on Atlantic's verified petition and bond. The appellees herein filed a motion in Federal Court to remand the cause to the District Court of Henderson County for the purpose of bringing in certain royalty owners who are alleged to be necessary and/or indispensable parties. The Federal District Court

overruled the motion to remand. The Court then proceeded to hear the case on its merits without the aid of a jury. Upon considering the pleadings, pre-trial stipulations and pre-trial order, and the evidence, the Court proceeded to render judgment against appellees on their cause of action and rendered judgment for Atlantic on its counter claim. The United States Court of Appeals for the Fifth Circuit reversed the trial court's order overruling the motion to remand and ordered the case remanded to the State Court for the joinder of indispensable parties, and thereby effected a reversal of the judgment on the merits in favor of Atlantic. Hilton v. Atlantic Refining Company, 327 F. 2d 217. On April 20th, 1967, after the cause had been remanded to the Henderson County District Court, the appellees herein (plaintiffs in the court below) joined by Willis D. Moore, as a plaintiff, amended their pleadings suing for title and possession of said tract alleging for the first time the lease executed by appellees, the Hiltons and McCoys, did cover the 82.713 acre tract, but asserting that appellant, Atlantic, exceeded the pooling powers in said lease, and there being no producing well on said tract when the primary term expired, that said lease terminated. Appellees filed motion for summary judgment based on the holding in Jones v. Killingsworth, 403 S.W. 2d 325 (Tex. Sup. 1965). Appellants also filed motion for summary judgment. The trial court granted appellees' motion for summary judgment and denied appellants' motion for summary judgment, resulting in this appeal.

On August 5, 1951, appellees, the Hiltons and McCoys, executed a 7/8ths oil and gas lease for a primary term of ten years referred to as the Hilton-Atlantic Lease covering a called 80-acre tract in the Alfred Benge Survey, Henderson County, Texas, re-surveyed to be 82.713 acres which was assigned to appellant Atlantic. Delay rentals were paid to cover the privilege of deferring commencement of drilling operations to the end of the primary term on August 5, 1961. The Hilton Lease provided for pooling for oil in units not substantially to exceed 40 acres in area with the provision "that should governmental authority having jurisdiction prescribe or permit the creation of larger units than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations."

Adjoining said Hilton and McCoy Tract on the West is the J. W. Melton Tract. Also, on August 5, 1951, appellants, J. W. Melton and wife, Virgie Melton, executed an oil and gas lease covering their tract, re-surveyed to be 83.815 acres, for a primary term of ten years, which was also assigned to appellant Atlantic. Delay rentals were also paid to the end of the primary term under this lease and same contained similar pooling provisions as in the Hilton et al Lease assigned to Atlantic.

The Railroad Commission on March 14, 1961, effective February 13, 1961, promulgated an order, which included the following:

> "No proration unit shall consist of more than 80 acres except as hereinafter provided * * *

> "Provided, however, that operators may elect to assign tolerance of not more than eighty (80) acres of additional unassigned lease acreage to a well on an eighty (80) acre unit and shall in such event receive allowable credit for not more than one hundred sixty (160) acres."

On June 12, 1961, the Railroad Commission amended its first order and ordered for the Fairway (James Lime) Field effective July 1, 1961, proration units of 80 acres plus 80 acres tolerance for each well and for filing of proration plats showing acreage assigned each well by July 1, 1961.

On June 30, 1961, Atlantic executed and filed for record a Declaration of Unit reciting itself to be the owner of said J. W. Melton and wife Lease and W. O. Hilton et al Lease, and reciting said leases granted the right and power to pool the lands covered by same with other land, leases or mineral interests "to form units of the size permitted or prescribed by the Railroad Commission of Texas"; and further reciting that by the order of the Railroad Commission "adopted rules providing for 160 acre spacing for oil", and that for the purpose of promoting conservation and complying with said spacing rules, Atlantic desired to declare a unit for the production of oil from the James Lime Formation, and in the exercise of its right and power declared said leases pooled so as to form a unit consisting of the North 80 acres of said W. O. Hilton et al Lease and the North 80 acres of the J. W. Melton and wife Lease.

Appellant, Atlantic, in either March or April, 1961, in preparing for making a drilling location on the Hilton Tract and as a result of a title requirement, sought from appellees,

the Hiltons and McCoys as lessors, the execution of a lease description amendment to correct an erroneous call in the lease description of the land calling for the beginning corner to be at the Northeast corner of the Hilton Tract and to go East, instead of for the beginning corner to be at the Northwest corner of the Hilton Tract. Appellees, the Hiltons and McCoys, were requested a number of times to execute the lease description amendment and to all these requests refused to do so. Atlantic then moved its drilling location to the adjoining Melton Tract and commenced drilling the well on April 30, 1961, completing same on June 8, 1961, in the James Lime Formation, with actual production of oil commencing on June 25, 1961, which has continued to date. No well has been drilled in the search of oil or gas on the Hilton and McCoy Tract and consequently no production of oil, gas or other minerals has been obtained therefrom.

The Hiltons and McCoys were presented division orders which they declined to execute.

Appellees, the Hiltons and McCoys, then on June 1, 1961, executed two top leases covering the 82.713 acre tract in favor of Willis D. Moore, which were for primary terms of ten (10) years. These leases were filed for record on December 28, 1966.

While this case was pending in the Federal Court, a pretrial order, including written stipulations of the parties, was entered and filed with the papers as part of the record made in open court in the case.

The stipulations in said pre-trial order contained appellees' stipulation that the issues involved in the suit related to the sufficiency of the land description in the W. O. Hilton et al Lease.

Upon remand to the State Court the appellees remained the same, appellant was the same, and appellees' lawsuit was the same until the second amended petition was filed by appellees on April 20, 1967, when the other party defendants (appellants) were brought in.

Appellants contend that said stipulations are binding contracts on the parties and are still in full force and effect and that the appellees should not be permitted to assert Atlantic exceeded its authority to pool or that said tracts were not pooled and further that appellees are not entitled to recover in this court on an assertion directly opposite that upon which they recovered judgment in the Federal Court.

Appellants' contentions under their first three points of error involve the effect of appellees' stipulations contained in the pre-trial order entered in this case at a prior time, by the Federal District Court.

Appellees stipulated in Federal Court that the basis of their recovery was the insufficiency of the description of the land. Thus, the question before the Federal Court was: Was the lease invalid for lack of a proper description? No contested fact issues were involved. Therefore, the issue before the Federal Court involved only a question of law.

(1) It seems to be a well established rule of law that stipulations of counsel with respect to the construction and legal effect of unambiguous contracts are not binding on either the court or the parties. Swift & Company v. Hocking Valley Railway Company, 243 U. S. 281, 37 S. Ct. 287, 61 L. Ed. 722 (1917); New Amsterdam Casualty Company v. Waller (C.A. 4th) 323 F. 2d 20, cert. den., 376 U.S. 963, 84 S. Ct. 1124, 11 L. Ed. 2d 981 (1963); Smith, Kirkpatrick & Co. v. Continental Autos, Ltd. (U.S.D.C.) 184 F. Supp. 764 (1960); American Chemical Paint Co. v. Dow Chemical Co. (C.A. 6th) 164 F. 2d 208 (1947); Reynolds v. McMan Oil & Gas Co., 11 S.W. 2d 778 (Tex. Com. App., 1928); Travelers' Indemnity Co. v. DeWitt, 207 S.W. 2d 641 (Tex. Civ. App., 1948, Galveston, n.w.h.); Bishop v. Sanford, 35 S.W. 2d 800 (Tex. Civ. App., Amarillo, 1931, writ dism.); 53 T.J. 2d, page 315, Sec. 3; see also 92 A.L.R. 663, 671.

(2) There was no claim that the lease was ambiguous. Under the above cited authorities, since the stipulated issues before the Federal Court involved only a question of law, appellees were not barred or foreclosed from thereafter amending their pleadings and proving that, as a matter of law, the Atlantic-Hilton Lease had terminated because of improper exercise of the pooling privilege under the doctrine of Jones v. Killingsworth, supra. These points are overruled.

The appellants next contend that "Appellees during the primary term of the Hilton-Atlantic lease wrongfully repudi-

ated Atlantic's title under said lease and thereby suspended the running of the primary term pending the determination of the controversy." This contention is also overruled.

It is appellants' position that one or more of three occurrences constituted a "repudiation" of the lease in question: (1) Hilton's and McCoy's refusal to execute a lease amendment; (2) the execution by Hilton and McCoy of two top leases to Mr. Moore; or (3) the statement made by Mr. Moore in a telephone conversation with Atlantic's Mr. Biard in the first week of July, 1961.

It is undisputed that Atlantic's employee, Paul Loman, was the only Atlantic representative who had direct contact with the lessors about the lease amendment. Mr. Loman, in his affidavit, offered by Atlantic in support of its motion for summary judgment, states:

> "* * * I think it was about March 1, 1961, that I first went to see Mr. Hilton about executing a lease description amendment for the purpose of correction the description of the land in the above lease. I know that I went back several times to see Mr. Hilton, and that, as I remember some time in May, 1961, Mr. L. A. McCoy who was then living in Louisiana made a trip back to East Texas, and that I also went to see him about executing the lease description amendment and also talked to him by long distance telephone. I know that Mr. Hilton and Mr. McCoy both refused to execute the lease description amendment, and that they both stated on one or more of the times mentioned above that Atlantic's lease was either good or it was not any good, and that if it was good then Atlantic did not need anything signed, and that they would not sign it. I also remember that on one of the occasions above, that one of the

wives stated that if the lease was not any good then they, the Hiltons and McCoys, owned the lease instead of Atlantic. To the best of my remembrance this last occasion was in the last part of May, 1961 * * *."

Mr. Hilton in his deposition offered by appellees testified as follows in response to questions propounded by Mr. McClendon:

"Q. Alright. Well, what did you tell him about whatever the paper was that he wanted you to sign?

"A. Well, I tried to get him to let me have it and take it to my attorney.

"Q. And what did he say?

"A. He wouldn't do it.

"Q. Alright.

"A. He put it back in his briefcase and tore out, back to town."

Mr. McCoy in his deposition which was also offered by appellees testified as follows in response to questions propounded by Mr. McClendon:

"Q. Well, what caused you to come to the conclusion that it was an invalid lease?

"A. When Atlantic's representatives went to trying to get in touch with me, to get me to sign some papers.

"Q. Did he talk to you about it?

"A. Yes, sir. He did.

* * * * *

"Q. Alright. Well, if you will, just state what was said in the conversation.

"A. Well, he came to me with these * * * he first brought 'em to Mr. Hilton and then he came over there.

I was up from New Orleans on a visit and he met me over there at Mr. Hilton's place and tried to get me to sign those papers. And I told him no that we had already signed some papers for the lease on the land. * * *

* * * * *

"Q. And did you tell him that you wouldn't sign them because the lease wasn't any good because it didn't describe the land?

"A. No. That wasn't the reason why I wouldn't sign 'em. I just didn't think it was necessary to sign another paper on that.

* * * * *

"Q. Alright. What was said then?

"A. Well, he said he would send me the papers to be signed again and he tried to get me to sign 'em again and I told him I wouldn't sign 'em. He asked me if I wanted him to fly down there and I told him no, that wouldn't be necessary.

"Q. Alright, Well, did he ever come back again or talk to you any more, after that?

"A. Not that I know of. No, sir."

The affidavit of Atlantic's employee, Jack Biard, of September 20, 1967, shows that the only contact he had with any of appellees was through his telephone call to Mr. Moore, attorney for the Hiltons and McCoys, in the first week of July, 1961.

Biard stated in his affidavit that in a telephone conversation with Willis Moore, attorney for the Hiltons and McCoys, in the first week of July, 1961, Mr. Moore advised him that the Hiltons and McCoys would not execute the lease description amendment because they (Hiltons and

McCoys) had decided that Atlantic did not own an oil and gas lease covering the Hilton, et al 80 acre, more or less, Tract in the Alfred Benge Survey because of the claimed defect in the description of the land.

A. A. Allen, by affidavit, also an employee of Atlantic, stated that a letter dated September 25, 1961, from Willis Moore was received by him on or about September 26, 1961, the pertinent parts of which read:

> "As I told Mr. Biard of your Tyler office during the first part of July, 1961, Mr. and Mrs. Hilton are of the opinion that your company does not hold any oil and gas lease covering the 80 acres that they own on the Alfred Benge League in Henderson County, Texas.
>
> "You are therefore requested to amend your Declaration of Unit recorded in Vol. 498, page 389 of the Deed Records of Henderson County, Texas, so as to delete the 80 acres of land belonging to them which 80 acres of land is included within the field notes contained in such Declaration of Unit.
>
> "Your immediate attention to this matter will be appreciated as Mr. and Mrs. Hilton and Mr. and Mrs. McCoy have recently had several opportunities to lease their land and feel that they are being damaged substantially so long as their title is clouded by your Declaration of Unit." (Emphasis ours).

(3) It is clear under the controlling authorities hereinafter cited that, as a matter of law, under the facts here presented the refusal of the Hilton and McCoys to execute the lease amendment was not a "repudiation" of the lease. The lessors' position was simply that Atlantic either had a valid lease or it did not.

(4) Under either version of the conversation between Moore and Biard, as related by them, it is clear that Moore did not tell Biard that Atlantic did not have a lease. Moore was only informing Biard that the Hiltons and McCoys were "of the opinion" or "had decided" that Atlantic did not have a lease. The statement by Moore to Biard was not a statement of Moore's legal opinion on the subject and did not constitute a "repudiation" of the lease by Moore. It is equally clear that Moore's statement did not constitute a repudiation of the lease by the Hilton and McCoys.

Moreover, Atlantic failed to establish that as a result of any of the grounds alleged to constitute repudiation of the lease, it suspended operations under the Hilton-Atlantic Lease or that it acted thereon to its prejudice. As a matter of fact, this record reveals that Atlantic, prior to and at the time of the expiration of the primary term of the lease on August 5, 1961, was of the opinion that it was continuing operations on the lease by virtue of combining the 80 acres of the Hilton and McCoy Lease with the 80 acres of the Melton Lease upon which tract the producing well was located establishing the 160 acre Atlantic-Melton Unit.

(5) The Supreme Court in the case of Kothmann v. Boley, 158 Tex. 56, 308 S.W. 2d 1 (1957) states the rule as follows:

> "Lessors who thus wrongfully repudiate the lessees' title by unqualified notice that the leases are forfeited or have terminated cannot complain if the latter suspends operations under the contract pending a determination of the controversy and will not be allowed to profit by their own wrong. * * *" (Emphasis ours).

See Sunray DX Oil Company v. Texaco, Inc., 417 S.W. 2d 424 (Tex. Civ. App., El Paso, 1967, writ ref., n.r.e.).

(6) In Adams v. Cannan, 253 S.W. 2d 948 (Tex. Civ. App., San Antonio, 1952, writ ref.) which involved an alleged repudiation of an oil and gas lease, the court stated:

> "The rule relied upon by appellees is one of equitable estoppel, and the generally accepted statement thereof is that made by the late Chief Justice Smith of this Court in Morgan v. Houston Oil Co., Tex. Civ. App., 84 S.W. 2d 312, 314, viz.:
>
> > " 'It is well settled that when a lessor determines to forfeit or cancel an oil and gas lease, and puts the lessee on notice thereof, he cannot complain if the latter suspends operations under the contract, pending the determination of the asserted right of the lessor to forfeit or cancel.' " (Emphasis ours).

This rule has lately been restated by the Supreme Court in Concord Oil Co. v. Alco Oil and Gas Corp., 387 S.W. 2d 635 (1965).

In the case of Steeple Oil & Gas Corp. v. Amend, 337 S.W. 2d 809 (Tex.Civ.App., Amarillo, 1960, writ ref., n.r.e.) the court was dealing with a similar situation wherein the lessor by letter had requested the owner of the oil and gas lease to give him a release as to the oil rights under his property because the owners of the oil and gas lease had not made any effort to exercise their rights to develop the properties covered by said lease. In disposing of this question, the court said:

> "We do not believe the tender of such letters are such as to 'wrongfully repudiate the lessee's title by unqualified notice that the leases are forfeited or have

terminated' within the holdings of our Supreme Court in Kothmann v. Boley, 158 Tex. 56, 308 S.W. 2d 1. To the contrary we believe the letters in the instant case are more comparable to those of similar import in Adams v. Cannan, Tex. Civ. App., 253 S.W. 2d 948, 951 (writ refused). In that case Justice Norvell said:

> "We do not regard the letter received by appellees on June 27, 1950, as presenting a clear, unequivocal challenge to lessee's title which is an essential basis of the doctrine relied upon. Although a release of the oil and gas lease was requested and there was some evidence that Adams had considered leasing the property to the Texas Company, should he be successful in securing the release, the letter itself does not purport to be a firm declaration of a position or contention that Adams held title to the premises involved to the exclusion of all rights of the appellees.' "

(7) Thus, it is well settled that a letter written by the lessor or his counsel addressed to the owner of the lease relative to apparent termination of the lease, and a lessor's request that a release of the lease be executed and returned as submitted, does not constitute such a clear and unequivocal challenge to the lessee's title as will excuse the suspension of operations by the owner of the lease. Adams v. Cannan, supra; 42 Tex. Jur. 2d 539, Sec. 239.

(8) "In order for an estoppel to exist, it devolves upon the party seeking the advantage thereof to establish that he has been misled to his injury." Concord Oil Co. v. Alco Oil and Gas Corp., 387 S.W. 2d 635 (Tex. Sup. 1965); Fitch v. Lomax, 16 S.W. 2d 530, 66 A.L.R. 758 (Tex. Com. App.) 1929. This the appellants have failed to

do. In its Third Amended Original Answer, Atlantic Richfield Company makes the following judicial admissions:

> "* * * * and believing that Plaintiff's claim, as to the lease being invalid for lack of sufficient description, to be without merit, this Defendant improved and operated the property and paid royalty to Plaintiff's grantees for a period of over five (5) years before Plaintiffs filed their Second Amended Petition * * *.
>
> * * * * *
>
> "* * * this Defendant now has, and has had and held peaceable, continuous, notorious and adverse possession of the oil, gas and other minerals in place under said land under the terms and provisions of said Lease and Declaration of Unit; and that this Defendant has been continuously producing oil and gas therefrom, * * *."

(9) These judicial admissions establish that the alleged "repudiation" was never relied on, and no operation was ever suspended during the primary term of the lease here in question by reason thereof.

We think it is apparent from a reading of the record in this case that neither Atlantic nor the appellees were aware there was any question about the legality of the Atlantic-Melton 160 acre unit until the Supreme Court delivered its decision in the case of Jones v. Killingsworth, 403 S.W. 2d 325 (1965). It is also apparent that up to that time, Atlantic was not aware that in attempting to establish the Atlantic-Melton Unit, it had exceeded the pooling powers granted by the provisions of said lease.

(10) It seems that when the lessor wrongfully repudiates an oil and gas lease, and puts the lessee on notice thereof,

the benefits that inure to the owner of the lease as a result thereof is the right or privilege to suspend operations under the lease contract pending a determination of the controversy. As shown by its pleadings above set out, Atlantic contends that it continued to operate upon the Hilton and McCoy property throughout the primary term of the lease.

Accordingly, we hold that the refusal of the Hiltons and McCoys to execute the amended lease tendered to them by Atlantic or the statement of Mr. Moore, the Hilton's and McCoy's attorney, did not present a clear, unequivocal challenge to lessee's title.

(11) In order to rely upon the top leases executed by the Hiltons and McCoys to their attorney, Mr. Moore, as a "repudiation" creating an estoppel, appellants had the affirmative burden of establishing that they had actual notice of such leases and that, in reliance thereon, operations were suspended under the Atlantic Lease. Petroleum Anchor Equipment, Inc. v. Tyra, 419 S.W. 2d 829 (S. Ct. 1967).

These top leases, which were executed on June 1, 1961, were not recorded until December, 1966, and appellants admit that they had no notice or knowledge of them prior to April 20, 1967, at a time long subsequent to the expiration date of the primary term of the Hilton and McCoy Lease assigned to Atlantic. There could not have been a suspension of operations during the primary term of the lease by reason of the top leases became appellants had no notice or knowledge of these leases during that period.

(12) Under all the authorities involving alleged repudiation, an unqualified notice of the act relied on to constitute repudiation is necessary. No such notice is shown in the record before us. As a matter of fact, appellant, 'Atlantic, in its reply brief admits that it was necessary under the rule announced in Kothmann v. Boley, supra, to prove notice to Atlantic of said repudiation. We are of the opinion that the execution of the top leases to Mr. Moore fails, as a matter of law, to constitute a "repudiation" of the Hilton-Atlantic Lease.

We have considered each of the appellants' contentions raised under their points of error and have concluded that they are without merit. They are each overruled.

Judgment of the trial court is affirmed.

APPENDIX C

Order Of The Supreme Court Of Texas In Which Application For Writ Of Error Was Refused On The Ground There Was No Reversable Error.

(Transcript of Proceedings in State Court of Civil Appeals)

IN THE SUPREME COURT OF TEXAS

No. B-1446 May 7, 1969

ATLANTIC RICHFIELD COMPANY et al.

v.

W. O. HILTON et al.

From Henderson County, Twelfth District

Application of petitioners for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Atlantic Richfield Company et al., and surety, United States Fire Insurance Company, pay all costs incurred on this application.

No. B-1446 June 11, 1969

ATLANTIC RICHFIELD COMPANY et al.

v.

H. O. HILTON et al.

From Henderson County, Twelfth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 11th day of June, 1969.

GARSON R. JACKSON, Clerk

By /s/ JEWELL SEELIGER, Deputy

Mrs. Jewell Seeliger

Filed in Court of Civil Appeals
12th Supreme Judicial District
Tyler, Texas on June 17, 1969

/s/ THOMAS E. WALL, Clerk

APPENDIX D

Order Granting Motion To Stay Mandate And Judgment Pending Petition For Writ Of Certiorari To The Supreme Court Of The United States.

(Transcript of Proceedings in State Court of Civil Appeals)

No. 402

In The Court of Civil Appeals
For The Twelfth Supreme Judicial District
Of Texas At Tyler

ATLANTIC RICHFIELD COMPANY, Et Al,
Appellants,

v.

W. O. HILTON, Et Al,
Appellees.

June 26, 1969

THIS DAY came on to be heard Appellants' Motion to Stay the Mandate and Judgment Pending Petition for Writ of Certiorari to the Supreme Court of the United States; and the same being inspected, it is the opinion of the Court that the motion should be, and the same is hereby, granted.

I, Thomas E. Wall, Clerk of the Court of Civil Appeals of the Twelfth Supreme Judicial District of the State of Texas, hereby certify that the foregoing is a true and correct copy of the Order of this Court entered in the above

cause on June 26, 1969, as same appears recorded in Minute Book 1, Page 363 of the Minutes of this Court.

Witness my hand and seal of said Court at Tyler, Texas, this the 29th day of July, 1969.

(SEAL) /s/ THOMAS E. WALL

Clerk of Said Court.

APPENDIX E

Plaintiffs W. O. Hilton Et Al Original Petition Filed In The District Court of Henderson County, Texas.

(U. S. 5th Circuit Court Record Volume 1, pps 7-9, and State District Court Transcript pps. 2-3)

(Number and title omited) . (Filed Nov. 22, 1961)

Now come W. O. HILTON and wife, MALVIRIN HILTON, and L. A. McCOY and wife, ILA MAE McCOY, hereinafter called Plaintiffs, complaining of THE ATLANTIC REFINING COMPANY, hereinafter called Defendant, and for cause of action respectfully show to the Court:

I

Plaintiffs W. O. Hilton and wife, Malvirin Hilton, reside in Henderson County, Texas. Plaintiffs L. A. McCoy and wife, Ila Mae McCoy reside in Anderson County, Texas. The Defendant, The Atlantic Refining Company, is a corporation (foreign) with offices at Dallas, Dallas County, Texas.

II

Plaintiffs say that they are, and were at the time of filing of this suit, owners of the title, and in possession of all that certain tract or parcel of land in Henderson County, Texas, described as follows, to-wit:

> All that certain tract or parcel of land situated on the ALFRED BENGE SURVEY, A-57, Henderson County, Texas, and being more particularly described as follows:
>
> BEGINNING at the Northeast corner of a 57.978 acre tract standing in the Name of Larkin Smith, et al;

THENCE North 81 deg. 06.1 min West 1216.21 feet with the North Line of said Smith tract and the North Line of the Clifford Emerson 40 acre tract to a point for corner;

THENCE North 08 deg. 33.2 min. West to a point for corner in the North Boundary Line of said ALFRED BENGE SURVEY A-662, said point being in the middle of a public road;

THENCE South 81 deg. 41.7 min. East along the North Boundary Line of said Benge Survey and the South Boundary Line of said Rachel Survey to a point for corner 2959.8 feet North 09 deg. 45.85 min. East of the place of beginning;

THENCE South 09 deg. 45.85 min. West 2959.8 feet to the place of BEGINNING, and containing 82.713 acres of land, more or less.

III

On or about June 30, 1961, the Defendant caused to be recorded a certain Declaration of Unit dated June 30, 1961, now recorded in Volume 498, page 389 of the Deed Records of Henderson County, Texas. Such instrument purports to include the above described property within a unit for production of oil from the James Lime Formation.

IV

Such instrument creates an adverse claim and cloud on Plaintiffs' title which should be removed, cancelled and held for naught.

WHEREFORE, Plaintiffs pray that Defendant be cited to appear and answer this petition, that on final hearing hereof Plaintiffs have judgment removing cloud from title as al-

leged, and that Plaintiffs have such other relief, legal and equitable, to which they may be entitled under the law and the facts, as well as all costs of suit.

MOORE & HOLLAND

By:

/s/ WILLIS D. MOORE

Attorneys for Plaintiffs

P. O. Box 392
Athens, Texas

APPENDIX F

Petition For Removal From State Court To U. S. District Court Filed By Atlantic In U. S. District Court.

(U. S. 5th Circuit Court Record Volume 1, pps. 2-7)

(Number and title omitted) (Filed Dec. 15, 1961)

TO THE HONORABLE JOE W. SHEEHY, JUDGE OF SAID COURT:

Comes now THE ATLANTIC REFINING COMPANY, a corporation, Defendant in the above cause, and files this, its Petition for Removal of said cause from the District Court of Henderson County, Texas, 3rd Judicial District, in which it is now pending, to the District Court of the United States for the Eastern District of Texas, Tyler Division, and as grounds therefor, would respectfully show:

I.

This cause was commenced in the District Court of Henderson County, Texas, for the 3rd Judicial District of Texas, where it bears Docket No. 61-199; citation was served on the Petitioner on the 27th day of November 1961, and twenty-days have not elapsed since service of sad citation.

II.

Said actioin is of a civil nature, which was brought by the Plaintiffs therein to remove a purported cloud alleged to have been cast upon Plaintiffs' title to a certain tract of land containing 82.713 acres, more or less, situated in the Alfred Benge Survey, A-57, Henderson County, Texas, which is described by metes and bounds in bounds in Plaintiffs' Petition, to which reference is here made, by virtue of the

terms and provisions of a certain Declaration of Unit dated June 30, 1961, executed by the Petitioner, The Atlantic Refining Company, recorded in Vol. 498, Page 389, Deed Records, Henderson County, Texas, which Declaration of Unit embraces that certain Oil & Gas Lease dated August 5, 1961, executed by the Plaintiffs in said suit, as Lessors, in favor of B. L. Garrett, as Lessee, recorded in Vol. 373, Page 255, Deed Records of Henderson County, Texas, covering the above mentioned land and premises, which Lease was held and owned by this Petitioner on the date of the execution and filing of the aforesaid Declaration of Unit, and the same is now held and owned by this Petitioner. That said Lease and said Declaration of Unit are now in full force and effect, and by this suit the Plaintiffs seek to rescind and cancel the same.

III.

This action involves a controversy which is wholly between citizens and residents of different states, in that the Plaintiffs, W. O. Hilton and wife, Malvirin Hilton, were at the time of the commencement of said action, and still are, citizens of the State of Texas and residents of the County of Henderson, and the Plaintiffs, L. A. McCoy and wife, Ila Mae McCoy, were at the time of the commencement of said action, and still are, citizens of the State of Texas and residents of the County of Anderson, all within the Tyler Division of the United States District Court for the Eastern District of Texas; and the Defendant, The Atlantic Refining Company, was at the time of the commencement

of this action, and still is, a private corporation, duly incorporated and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen and resident of that State, and had, and has, its principal place of business in the City of Philadelphia, State of Pennsylvania.

IV.

This action is one in which the value of the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, in that heretofore there has been drilled by Petitioner an oil well upon the land covered by and described in said Declaration of Unit, which is now producng oil in paying quantities, and in consequence thereof, the value of the oil and gas lease which the Plaintiffs have heretofore executed upon the land described in Plaintiff's Petition, which Plaintffs by their action herein seek to cancel and rescind, possesses a value far in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

V.

This action is one over which the District Courts of the United States are given original jurisdiction; and the proper Court to which this cause should be removed is the United States District Court for the Eastern District of Texas, Tyler Division.

VI.

Petitioner herewith presents a good and sufficient Bond, as provided by statute in such cases, conditioned that it

will pay all costs and disbursements which may be incurred by reason of these removal proceedings, if this Court shall hold that this action is not removable and was improperly removed thereto.

VII.

Petitioner herewith files a copy of all process, pleadings and orders heretofore served upon it in this action.

WHEREFORE, Petitioner herein, the Defendant in the above cause, prays that the above entitled and numbered cause be removed to this, the United States District Court for the Eastern District of Texas, Tyler Division, according to the statutes in such cases made and provided.

DATED this, the 15th day of December, A. D., 1961.

/s/ THOMAS B. RAMEY

Thomas B. Ramey
Citizens First National
Bank Bldg.,
Tyler, Texas 75701,
Attorney for Petitioner,
the Atlantic Refining Company.

Of Counsel:
RAMEY, BRELSFORD, HULL
& FLOCK,
Citizens First National
Bank Bldg.,
Tyler, Texas 75701.

(AFFIDAVIT OMITTED)

APPENDIX G

Motion To Remand Of Plaintiffs W. O. Hilton, Et Al, In The U. S. District Court.
(U.S. 5th Circuit Court Record, Volume 1, p. 16)

(Number and title omitted) (Filed 6-22-62)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, Plaintiffs in the above entitled and numbered cause, hereinafter called Plaintiffs, and respectfully move the Court, subject to their motion for non-suit heretofore filed in this cause, and the action of the Court thereon, to remand this cause to the District Court of Henderson County, Texas, and as grounds therefor respectfully show unto the Court the following:

1.

This suit affects the interests of numerous persons in and to the oil, gas and mineral royalty which may be produced from the lands described in Plaintiffs' Original Petition in this cause, and other lands described in the Declaration of Unit referred to in Plaintiffs' Original Petition. Such persons are all necessary parties and/or indispensable parties in the disposition of the matters in controversy in this cause, and no valid judgment can be rendered unless and until all said persons are made parties to this suit.

2.

Plaintiffs show the Court that the following persons own or claim an interest in and to the lands, or portions thereof,

described in said Declaration of Unit, and their respective residences are as shown below:

Fred M. Garrett	Frankston, Texas
C. S. McCain, Jr. et ux Cornelia D. McCain	c/o McCain, Mobley & Stephens, 1301 Petroleum Tower, Shreveport, Louisiana
Frances Walker McCain	Shreveport, Louisiana
Commercial Investment Company	Address Unknown
Edson Petroleum Company	1537 Esperson Building Houston, Texas
H. P. Riley	Box 63, Poynor, Texas
J. L. Wilcox	Route 4, Corsicana, Texas
Herbert Wilcox	Manchester, Missouri
Delta Drilling Company	Citizens Bank Building Tyler, Texas
W. O. Hilton and Malvirin Hilton	RFD 1, Frankston, Texas
L. A. McCoy and Ila Mae McCoy	RFD 1, Frankston, Texas
C. E. Willingham	319 W. Second, Tyler, Texas
J. W. Melton et ux Virgie Melton	RFD 1, Frankston, Texas
The Atlantic Refining Company	Dallas, Texas

Of the aforesaid and above named parties, only the Plaintiffs hereinbefore mentioned and The Atlantic Refining Company are presently parties to this suit.

WHEREFORE, premises considered, Plaintiffs pray that this motion to remand be granted, at the cost of Plaintiffs.

MOORE & HOLLAND

By /s/ WILLIS D. MOORE

Attorneys for Plaintiffs

APPENDIX H

Order Of U. S. District Court Denying Plaintiff W. O. Hilton, Et Al's Motion To Remand To State Court.

(U. S. 5th Circuit Court Record, Volume 1 at Page 34.)

(Number and title omitted) (Filed June 28, 1962)

On the 26th day of June, 1962, regularly came on to be heard the Motion of the Plaintiffs. W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, filed herein on June 22, 1962, to remand the above numbered and entitled cause to the District Court of Henderson County, Texas; and came said Plaintiffs, by their attorneys of record, and also came the Defendant, The Atlantic Refining Company, a corporation, by its attorneys of record; and the Court having heard and considered said Motion, and the evidence, and the argument of counsel pertaining thereto, and being of the opinion that Plaintiffs' said Motion is not well taken, rendered a decision in open Court on June 27, 1962, that Plaintiffs' said Motion be, and is, denied:

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion to Remand this cause to the District Court of Henderson County, Texas, is in all things denied and overruled, and that this cause shall remain on the docket of this Court for trial; to which action of the Court the Plaintiffs have duly excepted; and,

It appearing that during the course of the hearing on the aforesaid Motion, Plaintiffs announced in open Court that they desired to withdraw their Motion for Non-Suit heretofore filed in this cause on June 22, 1962; it is further

ORDERED that Plaintiffs' said Motion for Non-Suit shall be, and the same is hereby, dismissed.

SIGNED and ENTERED, this the 28th day of June, A. D., 1962.

/s/ JOE W. SHEEHY

Judge, U. S. District Court

APPENDIX I

Pre-Trial Order Including Stipulations And Approval Of Parties, And Made And Entered In the U. S. District Court, And Designated By W. O. Hilton Et Al, As Part Of The Record For Appeal To U. S. 5th Circuit Court.

(U.S. 5th Circuit Court Record, Volume 1, p. 40 and Exhibit to Atlantic's Motion for Summary Judgment)

(Number and title omitted) (Filed July 26, 1962)

A pre-trial conference was held in the above entitled cause before Honorable Joe W. Sheehy, Judge of said Court on the 26th day of July, 1962.

Willis D. Moore of the firm of Moore and Holland and James R. Lewis appeared as counsel for Plaintiffs and Cross-Defendants, W. O. HILTON, ET AL.

Thos. B. Ramey and Frank L. McClendon of the firm of Ramey, Brelsford, Hull & Flock appeared as counsel for Defendant and Cross-Plaintiff, THE ATLANTIC REFINING COMPANY.

I.

The following disposition has been heretofore made of pending motions preliminary to trial:

Heretofore on June 26, 1962, Plaintiffs announced in open Court that they desired to withdraw their Motion for Non-Suit and the Court ordered said Motion for Non-Suit dismissed. Also heretofore on June 26, 1962, the Court heard Plaintiffs' Motion to Remand this cause to the District Court of Henderson County, Texas, and said Motion was in all things denied and overruled to which action of the Court

the Plaintiffs duly excepted, and all stipulations herein contained are subject to said Plaintiffs' exceptions.

II.

In general the Plaintiffs and Cross-Defendants, W. O. HILTON, ET AL, claim that THE ATLANTIC REFINING COMPANY is a foreign corporation and that said Plaintiffs and Cross-Defendants are the owners of the title and in possession of an 82.713 acres, more or less, tract of land in the Alfred Benge Survey, Abstract No. 57, in Henderson County, Texas, described in their Amended Petition; that on or about June 30, 1961, Defendant and Cross-Plaintiff, THE ATLANTIC REFINING COMPANY, caused to be recorded a certain Declaration of Unit dated June 30, 1961, recorded in Volume 498, Page 389, of the Deed Records of Henderson County, Texas; that such instrument purports to include the above referred to tract within a unit for production of oil from the James Lime Formation; that such instrument creates an adverse claim and cloud on Plaintiffs', W. O. HILTON, ET AL., title which they allege should be removed, cancelled and held for naught, and pray that they have judgment removing cloud from title and such other relief as to which they are entitled under the law facts, as well as cost of suit.

III.

In general, the Defendant and Cross-Plaintiff, THE ATLANTIC REFINING COMPANY, admits that it is a foreign corporation and a non-resident of the State of Texas, incorporated in the State of Pennsylvania and having its prin-

cipal office in the City of Philadelphia, State of Pennsylvania; that said Defendant and Cross-Plaintiff denies the allegations of W. O. HILTON, ET AL, insofar as the ownership of the title and possession of the oil, gas and minerals in and under the land and premises therein described are concerned, in that said Defendant and Cross-Plaintiff, THE ATLANTIC REFINING COMPANY, claims that it is the owner of the valid subsisting Oil, Gas and Mineral Lease and leasehold title and estate in and to said land and premises, created and existing by virtue of a certain Oil and Gas Lease dated August 5, 1951, executed by said W. O. HILTON ET AL, as Lessors, in favor of B. L. Garrett, as Lessee, which is recorded in Volume 373, Page 255, of the Deed Records of Henderson County, Texas, together with all rights, title and privileges therein conveyed and conferred. THE ATLANTIC REFINING COMPANY admits that it executed and filed for record the Declaration of Unit referred to in the Amended Petition of W. O. HILTON, ET AL, but subject to the exception that said Declaration of Unit does not purport to include a small portion of the tract described in W. O. HILTON, ET AL's Petition consisting of approximately 2.173 acres out of the Southwestern portion of said tract. THE ATLANTIC REFINING COMPANY denies that said Declaration of Unit creates an adverse claim and cloud on Plaintiffs' title and denies that it should be removed, cancelled or held for naught as a cloud on Plaintiffs' W. O. HILTON, ET AL's title.

IV.

The following facts are established by the pleadings or are established by the stipulations or admissions of counsel as follows:

(1) Plaintiffs and Cross-Defendants, W. O. HILTON and wife, MALVRIN HILTON, are residents of Henderson County in the State of Texas, and L. A. McCoy and wife, ILA MAE McCOY, are residents of Smith County in the State of Texas, all within the Tyler Division of the United States District Court for the Eastern District of Texas; the Defendant and Cross-Plaintiff, THE ATLANTIC REFINING COMPANY, is a private corporation duly incorporated and existing under and by virtue of the laws of the State of Pennsylvania and a citizen and resident of that State and had and has its principal place of business in the City of Philadelphia, State of Pennsylvania. That this action is one in which the value of the matter in controversy exceeds the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS exclusive of interest and cost in that heretofore there has been drilled by THE ATLANTIC REFINING COMPANY an oil well upon the land covered by and described in the above Declaration of Unit, which is now producing oil in paying quantities and in consequence thereof, the value of the Oil and Gas Lease which Plaintiffs, W. O. HILTON, ET AL. have heretofore executed upon the land and which said Plaintiffs by their action herein deny ownership in Defendant, possesses a value far in excess of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS exclusive of interest and cost.

(2) It is further stipulated and agreed that, subject to the claim of title of THE ATLANTIC REFINING COMPANY to the above Oil and Gas Lease and leasehold estate and all right, titles and privileges thereunder, that Plaintiffs and Cross-Defendants; W. O. HILTON and wife, MALVRIN HILTON, and L. A. McCOY and wife, ILA MAE McCOY, own, and subject to any royalty interest heretofore reserved or conveyed by them, the title to an 82.713 acres, more or less, tract of land lying in the Alfred Benge Survey, Abstract No. 57, in Henderson County, Texas, bounded on the west by the J. W. Melton tract and bounded on the North by a public road and the M. L. Collier and W. F. Westbrook tracts and bounded on the East by a road and the W. F. Westbrook, Maud Dansby and B. F. Douglas tracts and bounded on the South by the Larkin Smith and Clifford Emerson tracts, and which is the tract intended to be described in said Plaintiffs', W. O. HILTON, ET AL, Amended Petition. That said tract is the only tract now or ever owned or possessed by said Plaintiffs, W. O. HILTON, ET AL, in said Alfred Benge Survey or the adjoining surveys.

V.

(1) That on August 5, 1951, W. O. HILTON and wife, MALVRIN HILTON, and L. A. McCOY and wife, ILA MAE McCOY, executed an Oil and Gas Lease in favor of B. L. Garrett, which is recorded in Volume 373, Page 255 of the Deed Records of Henderson County, Texas, as set forth in the Exhibits below and that said Lease was assigned to THE ATLANTIC REFINING COMPANY. That Defendant, THE ATLANTIC REFINING COMPANY, admits and will require no further

proof in this cause or upon the trial thereof that the Plaintiffs have held peaceable and adverse possession of the surface of all the land described by bounds in the foregoing paragraph, cultivating, using or enjoying the same and erecting valuable improvements thereon, continuously and without interruption since on or about November 5, 1942, but this stipulation shall not prejudice the validity of the lease in controversy held by THE ATLANTIC REFINING COMPANY; it is further stipulated and agreed by and between the parties hereto that the State of Texas parted with its title to said land prior to the year 1850.

(2) That THE ATLANTIC REFINING COMPANY claims to own a valid and subsisting Oil and Gas Lease dated August 5, 1951, executed by J. W. Melton and wife, Virgie Melton, and recorded in Volume 372, Page 415, of the Deed Records of Henderson County, Texas, covering said J. W. Melton tract consisting of 83.815 acres, more or less, adjoining said tract on the West.

(3) That as shown by the Exhibits below, the Railroad Commission, Oil and Gas Division, of the State of Texas, on March 4, 1961, promulgated on its Oil and Gas Docket No. 120 its Order No. 6-45,322 adopting rules and regulations for the Fairway (James Lime) Field in Anderson and Henderson Counties, Texas, whereby pooled units for oil were provided for as 80 acres plus a tolerance of 80 acres, making a pooled unit for oil of not more than 160 acres as shown by said Exhibits below. That on June 12, 1961, the Railroad Commission of Texas entered its Order effective July 1, 1961, merging the West Fairway (James Lime)

Field and the West Frankston (James Lime) Field into the Fairway (James Lime) Field, including the adoption of the Fairway Field rules providing for 160 acres for each oil unit as shown by the below Exhibits and which area includes the land here in controversy.

(4) That THE ATLANTIC REFINING COMPANY made its drilling location on the J. W. Melton tract 660 feet from the North Line and 330 feet from the East Line and commenced drilling by spudding in the well on April 30, 1961; that drilling was continued until the well was completed on June 8, 1961, in the James Lime Formation and after testing and further equipping said well actual production began on June 25, 1961, and has continued down to date. That the W. O. HILTON, ET AL, tract is completely surrounded by oil producing property at the present time.

(5) That as shown by the Exhibits below, on June 30, 1961, THE ATLANTIC REFINING COMPANY, reciting itself to be the owner of the above J. W. Melton lease and the above W. O. Hilton et al lease and reciting its pooling powers under said leases and the above Orders of the Railroad Commission, made the Declaration of Unit which was filed on June 30, 1961, in Volume 498, Page 389, of the Henderson County Deed Records, whereby a 160 acre unit was formed for the production of oil from the James Lime Formation and whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly 80 acres from the W. O. Hilton et al. lease, making the total of 160 acres and including what THE ATLANTIC REFINING COMPANY claims to be all of the W. O. Hilton et al land except a 2.713 acre

area out of the Southwest portion of said land; that said 2.713 acre area belonging to Plaintiffs and claimed by Defendants under its said lease has been pooled as a part of the Cities Service Oil Company 160 acre Oil Unit adjoining on the South.

(6) Plaintiffs' lawsuit was thereafter filed on November 22, 1961.

(7) That under the above referred to lease executed by W. O. HILTON, ET AL and now owned by THE ATLANTIC REFINING COMPANY, and which is shown in the Exhibits below, all annual delay rentals for the primary term of said lease were duly and timely paid and deposited by THE ATLANTIC REFINING COMPANY to the depository named therein, the First State Bank of Frankston, Texas, which bank deposited said rentals to the accounts of said W. O. HILTON, ET AL, who did not refuse the payments and deposits of said delay rentals.

VI.

(1) The contested issues of fact and law are those issues a statement of which each party has furnished to the other party copies which are hereto attached, and are herein referred to as Exhibit A and Exhibit B.

(2) The ultimate contested issue of law is whether or not the Oil and Gas Lease dated August 5, 1951, executed by Plaintiffs, W. O. HILTON, ET AL to B. L. GARRETT, in Volume 373, Page 255, of the Deed Records of Henderson County, Texas, and which Lease is now owned by The Atlantic Re-

fining Company, is a valid Oil and Gas Lease. Each party has furnished to the other a statement of the related issues pertaining to the aforesaid ultimate issue as shown by the attached Exhibit A and Exhibit B.

VII.

The below Exhibits were marked and received in evidence. The authenticity of these Exhibits has been stipulated, but they have been received subject to objections of the opposing party, if any, at the trial, to their relevancy, materiality and sufficiency except authenticity. If other Exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least three (3) days prior to trial. The Exhibits marked and received in evidence are as follows:

PLAINTIFFS' EXHIBITS NUMBERED AS FOLLOWS:

(1) The Deed dated January 29, 1859 from J. M. Doan to John Miller, recorded in Volume M, Page 453, of the Henderson County Deed Records;

(2) Declaration of Unit dated June 30, 1961, and executed by The Atlantic Refining Company and filed for record in Volume 498, Page 389, of the Henderson County Deed Records on June 30, 1961.

DEFENDANT'S EXHIBITS NUMBERED AS FOLLOWS:

(1) Patent dated March 13, 1849, from the State of Texas to Alfred Benge recorded in Volume 82, Page 53, of the Henderson County Deed Records at Page 4 of Abstract No. 14,989.

(2) Deed dated December 16, 1895, from John W. Henderson to Sam Dickerson, recorded in Vol. 42, Page 503, of the Henderson County Deed Records, covering a called 160 acre tract at Page 83, of Abstract No. 14,989.

(3) Deed dated November 2, 1904, from S. H. Dickerson, et ux, to S. A. Swanson, recorded in Vol. 54, Page 199, of the Henderson County Deed Records conveying an 80 acre tract being the West one-half of the foregoing 160 acres as shown at Page 89 of Abstract No. 14,989.

(4) Deed dated October 11, 1910, from S. A. Swanson, et ux, to W. J. Barfield, recorded in Vol. 66, Page 467, of the Henderson County Deed Records conveying the foregoing 80 acres, being the West one-half of the above 160 acres. See Page 92, of Abstract No. 14,989.

(5) Deed dated February 5, 1912, from Mary C. Barfield (surviving wife of W. J. Barfield) to John W. Melton (her son) recorded in Vol. 71, Page 2 of the Henderson County Deed Records, at Page 95 of Abstract No. 14,989.

(6) Oil and Gas Lease dated August 5, 1951, from J. W. Melton and wife, Virgie Melton, to B. L. Garrett recorded in Vol. 372, Page 415, of the Henderson County Deed Records at Page 144 of Abstract No. 14,989.

(7) Oil and Gas Lease Assignment dated August 6, 1951; from B. L. Garrett to E. C. Casey recorded in Vol. 414, Page 372 of the Henderson County Deed Records, assigning the foregoing Lease and appearing at Page 155 of Abstract No. 14,989.

(8) Oil and Gas Lease Assignment dated August 7, 1951, from E. C. Casey to The Atlantic Refining Company recorded in Vol. 373, Page 270, of the Henderson County Deed Records, assigning the foregoing lease and as shown at Page 159, of Abstract No. 14,989.

(9) Royalty Deed dated November 12, 1960, executed by J. W. Melton, et ux, to C. E. Willingham, recorded in Vol. 489, Page 455, of the Henderson County Deed Records, appearing at Page 163, of Abstract No. 14,989.

(10) Deed dated November 3, 1908, from S. H. Dickerson, et ux to Frank Guiher recorded in Vol. 165, Page 91 of the Henderson County Deed Records, conveying the W. O. Hilton, et al land and appearing at Page 9 of Abstract No. 14,990.

(11) Deed dated January 5, 1911, from Frank Guiher to J. M. Curry recorded in Vol. 67, Page 159, of the Henderson County Deed Records, conveying the same land conveyed in the foregoing Deed to Frank Guiher and as appears at Page 11, of Abstract No. 14,990.

(12) Divorce Decree, including approval of Property Settlement Agreement, which Divorce Decree is dated September 10, 1915, in Cause No. 3876, styled J. M. Curry vs. Nettie Curry in the District Court of Henderson County, Texas, as shown at Page 16 of Abstract No. 19,900.

(13) Property Settlement Agreement dated September 9, 1915, executed by J. M. Curry and Nettie Belle Curry and filed for record in Cause No. 3876, styled J. M. Curry vs. Nettie Curry in the District Court of Henderson County, Texas, and as shown by certified photostatic copy filed therein.

(14) Deed dated October 23, 1915, from J. M. Curry to E. M. Ganze recorded in Vol. 80, Page 206, of the Henderson County Deed Records, conveying what is called to be a 55 acre tract and as shown at Page 20 of Abstract No. 14,990.

(15) Deed dated October 23, 1915, from J. M. Curry to E. M. Ganze recorded in Vol. 112, Page 121, of the Henderson County Deed Records, conveying a 55 acre tract off of the North part of the 80 acre tract acquired above by J. M. Curry and as shown at Page 22 of Abstract No. 14,990.

(16) Deed dated December 29, 1915, from Nettie Curry a feme sole, to E. M. Ganze, in Vol. 77, Page 438,

of the Henderson County Deed Records, conveying a 25 acre tract off of the South portion of the 80 acre tract acquired by J. M. Curry and as shown at Page 24 of Abstract No. 14,990.

(17) Deed dated December 2, 1924, from E. M. Ganze, et ux to F. N. Drane, conveying First Tract called to contain 55 acres and Second Tract called to contain 25 acres and which Deed is recorded in Vol. 117, Page 651, of the Henderson County Deed Records and appears at Page 31, of Abstract No. 14,990.

(18) Deed dated December 27, 1924, from F. N. Drane to J. C. Wilcox, conveying First Tract called to contain 55 acres and Second Tract called to contain 25 acres making the total of 80 acres and which Deed is recorded in Vol. 109, Page 497, of the Henderson County Deed Records, and appears at Page 34, of Abstract No. 14,990.

(19) Deed dated August 3, 1925, from J. C. Wilcox and wife, Nora Wilcox, to Tom B. Gilliland recorded in Vol. 126, Page 260, of the Henderson County Deed Records conveying the land acquired above by J. C. Wilcox and reserving "one-half of the one-eighth interest" on all oil and gas. And which Deed appears at Page 40 of Abstract No. 14,990.

(20) Deed dated July 12, 1937, from Tom B. Gilliland to T. O. Milner, conveying the foregoing land and recorded in Vol. 222, Page 80, of the Henderson County Deed Records and appearing at Page 79 of Abstract No. 14,990.

(21) Deed dated July 29, 1937, from T. O. Milner, et ux, to W. A. Hogue, recorded in Vol. 188, Page 40, of the Henderson County Deed Records, conveying the foregoing land, and which Deed appears at Page 81 of Abstract No. 14,990.

(22) Deed dated October 11, 1938, from W. A. Hogue to T. O. Milner, conveying the foregoing land and recorded in Vol. 222, Page 420, of the Henderson County Deed Records, and appearing at Page 88 of Abstract No. 14,990.

(23) Deed dated October 11, 1938, from T. O. Milner, et ux, to W. A. Hogue, recorded in Vol. 323, Page 336, of the Henderson County Deed Records, conveying the foregoing land and appearing at Page 92, of Abstract No. 14,990.

(24) Divorce Decree dated June 4, 1940, in Cause No. 3468, styled W. A. Hogue vs. Ida Verna Hogue in the District Court of Henderson County, Texas, and appearing at Page 103, of Abstract No. 14,990.

(25) Deed dated July 20, 1940, from Ida Hogue, a feme sole, to W. A. Hogue, recorded in Vol. 243, Page 308 of the Henderson County Deed Records, conveying the foregoing land and which Deed appears at Page 104 of Abstract No. 14,990.

(26) Deed dated November 5, 1942, executed by W. A. Hogue and wife, Eva Hogue, to W. O. Hilton and L. A. McCoy, recorded in Vol. 253, Page 234, of the Henderson County Deed Records, and conveying a tract called to contain 80 acres, and which Deed appears at Page 112 of Abstract No. 14,990.

(27) Mechanic's Lien Contract dated June 16, 1947, executed by W. O. Hilton and wife, Malvrin Hilton, to Harry Williams, recorded in Vol. 8, Page 6, of the Mechanic's Lien Records of Henderson County, Texas, and appearing at Page 133 of Abstract No. 14,990.

(28) Oil and Gas Lease dated August 5, 1951, executed by W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to B. L. Garrett recorded in Vol. 373, Page 255, of the Henderson County Deed Records, describing what is called to be an 80 acre tract in two tracts of 55 acres and 25 acres and which lease appears at Page 139 of Abstract No. 14,990.

(29) Oil and Gas Lease Assignment dated August 6, 1951, from B. L. Garrett to E. C. Casey recorded in Vol.

320, Page 481, of the Henderson County Deed Records, assigning the foregoing Lease and as shown at Page 150, of Abstract No. 14,990.

(30) Oil and Gas Lease Assignment dated August 7, 1951, from E. C. Casey to The Atlantic Refining Company recorded in Vol. 373, Page 260 of the Henderson County Deed Records, assigning the foregoing Lease and as shown at Page 153 of Abstract No. 14,990.

(31) Royalty Deed dated April 1, 1961, from W. A. Hilton and wife, Malvrin Hilton and L. A. McCoy and wife, Ila Mae McCoy, to H. P. Riley, recorded in Vol. 494, Page 259, of the Henderson County Deed Records, appearing at Page 21 of Abstract No. 15,126.

(32) Royalty Deed dated April , 1961, (acknowledged April 25, 1961) executed by W. O. Hilton and wife, Malvrin Hilton, to H. P. Riley, recorded in Vol. 495, Page 190, of the Henderson County Deed Records stating that it is to correct the foregoing Deed in Vol. 494, Page 259, and which appears at Page 72, of Abstract No. 15,126.

(33) Royalty Deed dated May 6, 1961, executed by W. O. Hilton and wife, Malvrin Hilton, to H. P. Riley recorded in Vol. 495, Page 417, of the Henderson County Deed Records, and stating that it is to correct the foregoing Royalty Deeds in Vol. 494, Page 259, and in Vol. 495, Page 190, and which Correction Royalty Deed appears at Page 99, of Abstract No. 15,126.

(34) Royalty Deed dated June 19, 1961, executed by W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to Elise M. Young, recorded in Vol. 497, Page 558, of the Henderson County Deed Records and which appears at Page 128 of Abstract No. 15,126.

(35) Declaration of Unit dated June 30, 1961 and executed by The Atlantic Refining Company and filed

for record in Vol. 498, Page 389, of the Henderson County Deed Records on June 30, 1961, and appearing at Page 134, of Abstract No. 15,126.

(36) Royalty Deed dated September 7, 1961, executed by W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to James A. Latham, recorded in Vol. 503, Page 157, of the Henderson County Deed Records and appearing at Page 16 of Abstract No. 15,302.

(37) Affidavit dated June 8, 1945, executed by John R. Corley, recorded in Vol. 8, Page 415, of the Miscellaneous Records of Henderson County, Texas, and stating the marital history and heirship of J. C. Wilcox and wife, Nora Wilcox, who reserved the royalty interest in the above conveyance dated August 3, 1925, from J. C. Wilcox and wife, Nora Wilcox to Tom B. Gilliland, in Vol. 126, Page 260, of the Henderson County Deed Records. This Affidavit appears at Page 156 of Abstract No. 14,990.

(38) Royalty Deed dated May 29, 1944, from W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to Archie Price in Vol. 281, Page 442, of the Henderson County Deed Records, which appears at Page 117, of Abstract No. 14,990. It is agreed by the parties that the interest conveyed by this Royalty Deed was conveyed to Delta Drilling Company.

(39) Reference is made to the royalty interest reserved to J. C. Wilcox and wife, Nora Wilcox, in the Deed listed under (19) above dated August 3, 1925, from J. C. Wilcox and wife, Nora Wilcox, to Tom B. Gilliland, recorded in Vol. 126, Page 260 of the Henderson County Deed Records. Reference is also made to the affidavit listed under (37) above dated June 8, 1945, by John R. Corley in Vol. 8, Page 415 of the Miscellaneous Records of Henderson County, Texas, stating the marital history and heirship of J. C. Wil-

cox and wife, Nora Wilcox. It is agreed that the royalty interest of Nora Wilcox was conveyed to Fred M. Garrett who is now the owner of same. It is further agreed that the royalty interests of the children and heirs of J. C. Wlcox, deceased, were all conveyed to H. P. Riley except the interest of J. L. Wilcox and Herbert Wilcox who still own their interests. It is further agreed that all of the heirs of J. C. Wilcox, deceased, who conveyed to H. P. Riley executed in favor of H. P. Riley Correction Deeds correcting the description of the land so as to show the beginning corner of the 55 acre portion of the called 80 acre tract as "Beginning at the NW corner of an 80 acre tract of land heretofore bought by J. M. Curry from Frank Guiher."

(40) Royalty Deed dated April 19, 1961 from H. P. Riley to Frances Walker McCain, recorded in Vol. 494, Page 614 of the Henderson County Deed Records appearing at Page 60 of Abstract No. 15,126.

(41) Royalty Deed dated May 4, 1961, from Frances Walker McCain to C. S. McCain, Jr. and wife, Cornelia D. McCain, recorded in Vol. 495, Page 527 of the Henderson County Deed Records and appearing at Page 88 of Abstract No. 15,126.

(42) Royalty Deed dated April 25, 1961 from H. P. Riley to Commercial Investment Company recorded in Vol. 495, Page 427 of the Henderson County Deed Records and appearing at Page 78 of Abstract No. 15,126.

(43) Royalty Deed dated April 27, 1961 executed by H. P. Riley to Edson Petroleum Company recorded in Vol. 495, Page 317 of the Henderson County Deed Records and appearing at Page 83 of Abstract No. 15,126.

(44) Oil and Gas Lease Ratification dated May 25, 1961, executed by H. P. Riley in favor of The Atlantic Re-

fining Company recorded in Vol. 499, Page 77 of the Henderson County Deed Records and appearing at Page 105 of Abstract No. 15,126.

(45) Oil and Gas Lease Ratification dated June 1, 1961, executed by C. S. McCain, Jr., and wife, Cornelia D. McCain, and Frances Walker McCain to The Atlantic Refining Company, recorded in Vol. 499, Page 77 of the Henderson County Deed Records and appearing at Page 105 of Abstract No. 15,126.

(46) Oil and Gas Lease Ratification dated June 9, 1961, executed by J. L. Wilcox and wife, Thelma Wilcox, and Herbert Wilcox in favor of the Atlantic Refining Company, recorded in Vol. 499, Page 78 of the Henderson County Deed Records and appearing at Page 113 of Abstract No. 15,126.

(47) Oil and Gas Lease Ratification dated August 4, 1961, executed by Delta Drilling Company to The Atlantic Refining Company, recorded in Vol. 500, Page 574 of the Henderson County Deed Records, appearing at Page 23 of Abstract No. 15,302.

(48) Royalty Deed dated September 7, 1961, executed by Commercial Investment Company to James A. Latham recorded in Vol. 502, Page 503, of the Henderson County Deed Records and appearing at Page 4 of Abstract No. 15,302.

(49) Royalty Deed dated September 7, 1961, executed by Commercial Investment Company to Henry Moore III recorded in Vol. 503, Page 9 of the Henderson County Deed Records and appearing at Page 10 of Abstract No. 15,302.

(50) Title Questionnaire executed by W. O. Hilton and L. A. McCoy on August 5, 1951.

(51) Plat of land identified by Herbert Daugherty, Surveyor.

9.

The following amendments of the pleadings were allowed:

Plaintiffs First Amended Petition and

Defendants Amended Answer and Cross-Action.

APPROVED:

/s/ WILLIS D. MOORE

/s/ JAMES R. LEWIS

Attorneys for Plaintiffs

APPROVED:

/s/ THOS. B. RAMEY

/s/ FRANK L. MCCLENDON

Attorneys for Defendant

Dated at Tyler, Texas this the 26th day of July, 1962.

/s/ JOE W. SHEEHY

Judge

EXHIBIT "A" TO PRE-TRIAL ORDER

RE: PRE-TRIAL ORDER

Plaintiffs, W. O. HILTON and wife, MALVRIN HILTON, and L. A. McCoy, and wife ILA MAE McCOY, hereinafter called Plaintiffs, hereby furnish to Defendant's counsel the follow-

ing statement of issues which Plaintiffs will offer evidence to support from Plaintiffs' standpoint:

1.

The description of the land referred to in the oil, gas and mineral lease under which The Atlantic Refining Company is claiming in this cause is not sufficient to identify, or to furnish the means of identifying, any land that can be located upon the ground.

2.

The descriptive clause contained in the lease in controversy relative to "all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above" in said lease has no application in this case, since none of the land in controversy is either "adjacent" or "contiguous" to the land so particularly described in said lease.

3.

Plaintiffs accepted no payment of delay rentals under any oil and gas lease covering any land that can be identified as the land described in Plaintiffs' First Amended Original Complaint.

4.

Neither of the Plaintiffs nor any other person authorized by either of them has heretofore made any representations to the Lessee named in the lease in controversy that said

lease covered any of the land described in Plaintiffs' First Amended Original Complaint.

5.

Neither of the Plaintiffs has executed any royalty deed sufficiently and correctly describing the land referred to and described in their First Amended Original Complaint.

6.

Neither of the Plaintiffs has executed any royalty deed or other instrument containing any specific reference to or adoption of the oil and gas lease in controversy, nor have they executed any instrument which does or could operate as a ratification of any oil and gas lease covering or applying to the land described in Plaintiffs' First Amended Original Complaint.

7.

By the execution and filing of the Unit Declaration dated June 30, 1961, recorded in Vol. 498, Page 389 of the Deed Records of Henderson County, Texas, Defendant has placed a cloud upon Plaintiffs' title to the land described in their First Amended Original Complaint.

8.

Plaintiffs have had and held peaceable and adverse Possession of the land described in their First Amended Original Complaint, and the minerals therein and thereunder, cultivating, using or enjoying the same and making valuable

improvements thereon, continuously and without interruption for more than ten years prior to the filing of this suit.

/s/ WILLIS D. MOORE,

Willis D. Moore,
Athens, Texas,

/s/ JAMES R. LEWIS,

James R. Lewis,
Fair Foundation Bldg.,
Tyler, Texas,
ATTORNEYS FOR PLAINTIFFS.

OF COUNSEL:
MOORE & HOLLAND,
Athens, Texas.

EXHIBIT "B" TO PRE-TRIAL ORDER
RE: PRE-TRIAL ORDER

Defendant, THE ATLANTIC REFINING COMPANY, hereby furnishes to Plaintiffs' counsel the following statement of issues which Defendant will offer evidence to support from Defendant's standpoint:

I.

The Atlantic Refining Company's Lease does in fact adequately describe Plaintiffs' land, according to accepted rules of law governing descriptions of real estate in conveyances and oil leases.

II.

That Plaintiffs' land being the only land that Plaintiffs own in the Alfred Benge Survey, it was the intention of Plaintiffs to lease said land when they executed the lease in controversy to B. L. Garrett.

III.

In view of the all-inclusive descriptive clause contained in the lease in controversy, said lease does cover and include Plaintiffs' land.

IV.

It was the intention of Plaintiffs as Lessors and B. L. Garrett as Lessee when the lease in controversy was executed that said lease should cover and affect Plaintiffs' land in the Alfred Benge Survey.

V.

That Plaintiffs have executed royalty deeds in favor of a number of parties in which Plaintiffs' land was correctly described, and references therein are made to the subsisting oil and gas lease which Defendant owns and therefore same amounts to a ratification, adoption and confirmation by Plaintiffs of Defendant's lease.

VI.

The Plaintiffs having accepted the payment in cash of a substantial consideration for the execution of the lease in

controversy and also having accepted the payment of nine annual delay rentals as specified in the lease, Plaintiffs are now estopped to deny the validity of the lease in controversy.

VII.

When the lease in controversy was executed the Plaintiffs represented to the Lessee that said lease covered and affected the land and premises in controversy, and Plaintiffs therefore are estopped to deny the validity of said lease.

VIII.

That in view of the facts and circumstances hereinabove recited in the foregoing issues, the Plaintiffs are estopped to plead and assert the ten (10) year Statute of Limitations as a defense to Defendant's claim and title to the lease in controversy.

/s/ THOS. B. RAMEY,
Thos. B. Ramey,

/s/ FRANK L. MCCLENDON,
Frank L. McClendon
Citizens First National Bank
Bldg. Tyler, Texas,
ATTORNEYS FOR DEFENDANT.

OF COUNSEL:

RAMEY, BRELSFORD,
HULL & FLOCK,
Tyler, Texas.

APPENDIX J

Findings Of Fact And Conclusions Of Law By U. S. District Court And Designated By W. O. Hilton, Et Al As Part Of Record For Appeal To U. S. 5th Circuit Court.

(U. S. 5th Circuit Court Record Volume 1, pps. 80-89)

(Number and title omitted) (Filed Oct. 18, 1962)

The above cause came on regularly for trial and the Court having duly considered the pleadings, the stipulations in the pre-trial order, and the evidence, and being fully advised in the premises, now finds the following:

FINDINGS OF FACT

(Paragraphs 1, 2, and 3 are omitted)

4. During the first half of the Year 1961, the Railroad Commission of Texas established rules and regulations respecting the development of leases in the area in which the land in controversy *is* located in what is known as the Fairway Field. Such regulations provided for drilling units of not less than eighty (80) acres of land and not more than one hundred sixty (160) acres of land. Accordingly, by instrument dated June 30, 1961, which was duly recorded during the primary term of the aforesaid lease, Defendant, The Atlantic Refining Company, promulgated a Declaration of Unitization which embraced 80 acres of the land in controversy and also 80 acres of land situated to the West thereof, which is owned by J. W. Melton and upon which Defendant also owned the subsisting oil and gas lease. A producing oil well was drilled and completed by Defendant on said Unit at a location on the Melton tract of land,

before the expiration of the primary term of both of the leases covering the lands included in the Unit. This well has been producing oil in paying quantities ever since its completion.

5. A recent resurvey of Plaintiffs' land discloses that said tract contains 82.713 acres instead of 80 acres. There was omitted from the aforesaid Unit created by the Defendant 2.713 acres off the South end of Plaintiffs' land, and this small parcel of land was subsequently included in another 160 acre drilling Unit which was formed by another oil company, to-wit, Cities Service Oil Company.

(Paragraph 6. is omited as not here necessary.)

7. Plaintiffs' counsel announced in open Court as well as in Plaintiff's Memorandum Briefs which were submitted to the Court, that Plaintiffs were not relying upon the aforesaid error in the beginning call of the description of said property. In this connection, Plaintiffs' counsel contended as the sole basis of this suit that there existed a defect in the description in early deeds in the chain of title to this property. The alleged defect * * * (omitted as not being here necessary.)

(Paragraphs 8, 9, 10, 11, 12 and 13 are omitted)

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as a matter of law, as follows:

1. That the description of land contained in the oil and gas lease dated August 5, 1951, which Plaintiffs, as Lessors,

executed in favor of B. L. Garrett, as Lessee, and which is now held and owned by Defendant, is adequate and sufficient to describe the land in controversy with reasonable certainty, when resort is had to the references and data therein mentioned as being the same land which is claimed and occupied by Plaintiffs.

2. That the land which is claimed and occupied by Plaintiffs is the same land which was intended to be covered and affected by the aforesaid lease which Plaintiffs, as Lessors, executed in favor of B. L. Garrett, as Lessee, and which is now held and owned by Defendant.

3. That although Plaintiffs have been in possession and occupation of the land in controversy, cultivating, using and living upon the same for more than ten consecutive years, Plaintiffs have not perfected a title by limitation to the oil and gas thereunder as against Defendant's oil and gas leasehold interest which Defendant holds by virtue of being the owner of the lease dated August 5, 1951, which Plaintiffs, as Lessors, executed in favor of B. L. Garrett, as Lessee.

4. That the above mentioned oil and gas lease which Defendant holds and owns is a valid and subsisting lease which covers and affects the land in controversy, and said lease is now in full force and effect.

5. That Plaintiffs have by their acts and conduct fully ratified and confirmed the validity of the aforesaid oil and gas lease dated August 5, 1951, as well as the ownership thereof by Defendant.

6. That Plaintiffs have by their acts and conduct estopped themselves to contest the validity of the aforesaid oil and gas lease, as well as the ownership thereof by Defendant.

7. That the Declaration of Unit dated June 30, 1961, incorporating 80 acres of the land in controversy, which Defendant caused to be executed and recorded, is valid and in full force and effect and the same creates no cloud or adverse claim upon plaintiffs' title to the land in controversy which should be removed.

8. That Defendant has shown by proper evidence that it is entitled to recover upon its Counter-Claim the title and possession of the subsisting oil and gas leasehold estate covering and affecting the land in controversy, according to the terms and provisions of the lease dated August 5, 1951, which was executed by Plaintiffs, as Lessors, in favor of B. L. Garrett, as Lessee.

ORDER FOR JUDGMENT

WHEREFORE, it is considered by the Court that decree should be entered herein that Plaintiffs recover nothing by their suit and that Defendant recover Judgment on its Counter-Claim for title and possession of the oil and gas leasehold estate in the land in controversy as evidenced by the terms and provisions of the above mentioned oil and gas lease.

DATED this the 18th day of October, 1962.

/s/ JOE W. SHEEHY
Judge, United States District Court

APPENDIX K

Decree And Judgment After Trial on Merits In The U. S. District Court

(U.S. 5th Circuit Court Record, Volume 1, p. 89)

(Number and title omitted) (Filed Oct. 18, 1962)

On the 21st day of September, 1962, regularly came on for trial the above entitled and numbered cause, and came all parties by their attorneys of record and answered ready for trial; and no jury having been demanded, the Court heard and considered the pleadings, the pre-trial stipulations and pre-trial order, and the evidence as introduced by all parties; and the Court being of the opinion that the Plaintiffs, W. O. HILTON and wife, MALVIRIN HILTON, and L. A. McCOY and wife, ILA MAE McCOY, are not entitled to recover by their suit herein against the Defendant, THE ATLANTIC REFINING COMPANY; and that said Defendant should recover of Plaintiffs upon its counterclaim:

It is, therefore, ORDERED, ADJUDGED and DECREED that the Plaintiffs, W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, recover nothing by their suit against the Defendant, The Atlantic Refining Company; and Plaintiffs are denied all relief prayed for herein.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, The Atlantic Refining Company, recover judgment upon its Counter-Claim of the Plaintiffs, W. O. Hilton and

wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, the title and possession of the subsisting oil and gas leasehold estate as evidenced by the terms and provisions of that certain oil and gas lease dated August 5, 1951, executed by Plaintiffs, as Lessors, in favor of B. L. Garrett, as Lessee, which lease is recorded in Vol. 373, Page 255, of the Deed Records of Henderson County, Texas; together with all rights, titles and provisions therein conveyed and conferred, insofar as said lease covers and affects the following described land and premises, to-wit:

Situated in the Alfred Benge Survey, Abstract No. 57, Henderson County, Texas, and

BEGINNING at a point on the North line of the said Alfred Benge Survey, which is the Northeast corner of that certain tract conveyed by March C. Barfield to John W. Melton by deed dated February 5, 1912, recorded in Volume 71, Page 2, Deed Records of Henderson County, Texas;

THENCE South 80 deg. 37.9 min. East 1251.7 feet with the North Boundary Line of the said Alfred Benge Survey to corner in public road;

THENCE South 10 deg. 49.7 min. West 2959.8 feet to corner;

THENCE North 80 deg. 02.3 min. West 975.7 feet;

THENCE North 78 deg. 12 min. West 213.6 feet to corner;

THENCE North 09 deg. 37 min. East 2939.7 feet to place of beginning,

CONTAINING 82.713 acres of land, more or less.

It is further ORDERED that all costs in this cause incurred be and the same are hereby assessed against the Plaintiffs, for which execution may issue.

SIGNED and ENTERED this the 18th day of October, 1962.

/s/ JOE W. SHEEHY

United States District Judge

APPENDIX L

Designation Of Record For Appeal From U. S. District Court To U. S. 5th Circuit Court By W. O. Hilton, Et Al As Appellants

(U.S. 5th Circuit Court Record Volume 1, p. 98)

(Number and title omitted) (Filed Dec. 12, 1962)

Pursuant to Rule 75(a) of the Rules of Civil Procedure, Appellants hereby designate the following portion of the record, proceedings and evidence to be contained in the record on appeal in this action.

1. Petition for Removal, together with Notice of such petition.
2. Defendant's Original Answer.
3. Defendant's Counter-Claim.
4. Plaintiffs' Motion to Remand.
5. Defendant's Answer to Plaintiffs' Motion to Remand.
6. All proceedings, evidence, testimony and exhibits heard and introduced at the hearing on Plaintiffs' Motion to Remand.
7. Order Denying Plaintiffs' Motion to Remand.
8. Plaintiffs' Original Answer to Defendant's Counter-Claim.
9. Plaintiffs' First Amended Original Complaint.
10. Pre-trial Order.

11. Defendant's Second Amended Answer and Amended Counter-Claim.
12. Plaintiffs' Original Answer to Defendant's Second Amended Counter-Claim.
13. Motion for Withdrawal as Attorneys for Plaintiffs.
14. Order Granting Motion for Withdrawal as Attorneys for Plaintiffs.
15. Findings of Fact and Conclusions.
16. Judgment of the Court.
17. Motion for Amendment of Findings of Fact.
18. Order on the aforesaid motion.
19. Notice of Appeal filed November 17, 1962.
20. Order Allowing Late Deposit for Costs on Appeal.
21. Cash Deposit for Costs on Appeal.
22. Appellants' Statement of Points.
23. This designation.

/s/ WILLIS D. MOORE,

Willis D. Moore,
P. O. Box 392,
Athens, Texas,
ATTORNEYS FOR APPELLANTS.

APPENDIX M

Plaintiffs W. O. Hilton Et Al Second Amended Petition Filed After Remand To State District Court

(State District Court Transcript pps. 4-11)

(Number and title omitted) (Filed April 20, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, and Willis D. Moore, Plaintiffs herein, file this Second Amended Original Petition complaining of Atlantic Richfield Company, a Pennsylvania corporation, and the other Defendants named in Subparagraph 1(c) and 1(d) below, and for cause of action respectfully allege:

1.

(a) Plaintiffs W. O. Hilton and wife, Malvirin Hilton reside in Henderson County, Texas. Plaintiffs L. A. McCoy and wife, Ila Mae McCoy, reside in Smith County, Texas. Plaintiff Willis D. Moore resides in Henderson County, Texas.

(b) Atlantic Richfield Company (herein called "Defendant Atlantic Richfield"), a Pennsylvania corporation, with authority to transact business in Texas, is the successor in interest, by merger, of The Atlantic Refining Company, the original Defendant in this Action, and is presently before the Court.

(c) Cities Service Petroleum Company (herein called "Defendant Cities Service") is a Delaware corporation with

authority to transact business in Texas, whose registered agent for service in Texas is United States Corporation Company, Brown Building, Austin, Travis County, Texas.

(d) The following Defendants

(1) Fred M. Garrett, who resides in Frankston, Henderson County, Texas;

(2) Edson Petroleum Company, a Delaware corporation, with authority to transact business in Texas, its registered agent for service being CT Corporation System, 811 Dallas Avenue, Houston, Harris County, Texas;

(3) H. P. Riley, who resides in Poyner, Henderson County, Texas;

(4) James A. Latham, who resides in Shreveport, Caddo Parish, Louisiana;

(5) Commercial Investment Company, a Texas corporation, its registered agent for service in Texas being Austin Prestwood, 1409 San Jacinto Street, Houston, Harris County, Texas;

(6) Elise M. Young, who resides in Oklahoma City, Oklahoma County, Oklahoma;

(7) J. L. Wilcox, who resides at Route 4, Corsicana, Navarro County, Texas;

(8) C. S. McCain, Jr., and wife, Cornelia McCain, who reside in Shreveport, Caddo Parish, Louisiana;

(9) Frances Walker McCain, a widow, who resides in Shreveport, Caddo Parish, Louisiana (or Jackson County, Missouri);

(10) Herbert Wilcox, who resides in Manchester, St. Louis County, Missouri;

(11) J. W. Melton and wife, Virgie Melton, who reside in Frankston, Henderson County, Texas;

(12) C. E. Willingham, who resides in Tyler, Smith County, Texas;

(13) Harve A. Thomas, who resides in Texarkana, Miller County, Arkansas;

(14) Henry Moore, III, who resides in Texarkana, Miller County, Arkansas;

each own or claim to own mineral or royalty interests in certain of the lands included in, covered and affected by (a) the Declaration of Unit (herein called the "Melton Unit") executed by The Atlantic Refining Company, dated June 30, 1961, and recorded in Volume 498, Page 389, Deed Records, Henderson County, Texas, (b) the Designation of Unit (herein called the "Emerson Unit") executed by Cities Service Petroleum Company and The Atlantic Refining Company, dated February 5, 1962, recorded in Volume 511, Page 105, Deed Records, Henderson County, Texas, and (c) the Unit Agreement, Fairway (James Lime) Unit, Henderson and Anderson Counties, Texas, (herein called the "Fairway Unit") dated as of October 1, 1963, recorded in Volume 580, Page 405, Deed Records, Henderson County, Texas.

(e) The Defendants named in Subparagraphs 1(b), 1(c) and 1(d) above are sued herein individually and as joint and several representatives of a class composed of all of the persons and entities who own or claim to own any interests of any character (including, by way of illustration and not limitation, interests in oil, gas and mineral leases, royalty interests and overriding royalty interests) in the mineral fee estate in the lands attempted to be included in the Melton Unit, the Emerson Unit and the Fairway Unit. The persons and entities who compose such class are so numerous (being in excess of 1,000 such persons and entities) as to make it impracticable to bring all of them before the Court. The character of the right sought to be enforced against the persons and entities comprising the class are joint, or, in the alternative, are several, and the objective of Plaintiffs' action is the adjudication of claims which do or may affect specific property involved in this action, or, in the further alternative, are several, and there is one or more common questions of law or fact affecting the several rights involved in this action, and common relief is sought herein by Plaintiffs against all of the persons and entities comprising said class. The Defendants named herein as representative of said class will fairly insure the adequate representation of all members of such class.

2.

(a) On August 6, 1961, Plaintiffs W. O. Hilton and wife, Malvirin Hilton, L. A. McCoy and wife Ila Mae McCoy, were, and now are, the owners in fee simple (except, however, certain outstanding royalty interests conveyed by

Plaintiffs to certain third parties who either are Defendants or are members of the class of which the Defendants are the representatives, the title to which royalty interests is not an issue in this action) and entitled to the possession of the mineral fee estate in the following described 82.713 acres of land in the Alfred Benge Survey, Abstract No. 57, Henderson County, Texas (herein called "the 82.713 acre tract"):

> BEGINNING at the Northeast corner of 57.978 acre tract standing in the name of Larkin Smith, et al;
>
> THENCE North 81 deg. 06.1 min. West 1216.21 feet with the North line of said Smith tract and the North line of the Clifford Emerson 40 acre tract to a point for corner;
>
> THENCE North 08 deg. 33.2 min. West to a point for corner in the North Boundary Line of said ALFRED BENGE SURVEY and also in the South Boundary Line of the JOHN RACHEL SURVEY, A-662, said point being in the middle of a public road;
>
> THENCE South 81 deg. 41.7 min. East along the North Boundary Line of said Benge Survey and the South Boundary Line of said Rachel Survey to a point for corner 2959.8 feet North 09 deg. 45.85 min. East of the place of beginning;
>
> THENCE South 09 deg. 45.85 min. West 2959.8 feet to the place of BEGINNING, and containing 82.713 acres of land, more or less;

subject only to the two valid and subsisting oil, gas and mineral leases executed by the Plaintiffs named above in this Paragraph 2(a), as Lessors, to the Plaintiff, Willis D. Moore, as Lessee, dated June 1, 1961, recorded in Volume 600, Pages 443 and 445, Deed Records, Henderson County,

Texas, which leases cover, in the aggregate, the 82.713 acre tract.

(b) On August 6, 1961, Plaintiff, Willis D. Moore, was and now is the owner and entitled to possession of the oil, gas and mineral leasehold estate in the 82.713 acre tract created by the oil, gas and mineral leases described in Paragraph 2(a) above.

(c) The Defendants afterward, on August 7, 1961, unlawfully entered upon and dispossessed Plaintiffs of Plaintiffs' said interests in the 82.713 acre tract and withhold from Plaintiffs the possession thereof.

(d) The reasonable value of the use and enjoyment of the said interests of Plaintiffs in the 82.713 acre tract daring Defendants' wrongful withholding of possession thereof is $250,000.00, which Defendants have refused to pay.

3.

Plaintiffs W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, as Lessors, executed to B. L. Garrett, as Lessee, an oil, gas and mineral lease covering the 82.713 acre tract (herein called "the Hilton-Garrett lease") dated August 5, 1951, recorded in Volume 373, Page 255, Deed Records, Henderson County, Texas, which lease was thereafter assigned to The Atlantic Richfield. Defendant Atlantic Richfield executed and recorded the Declaration of the Melton Unit (described in Paragraph 1(d)), wherein Defendant Atlantic Richfield purported to include 80 acres of the 82.713 acre tract in the Melton Unit for the production of oil, and Defendants

Atlantic Richfield and Cities Service executed and recorded the Designation of the Emerson Unit (Described in Paragraph 1(d)), wherein Defendants Atlantic Richfield and Cities Service purported to include the remaining 2.713 acres of the 82.713 acre tract in the Emerson Unit for the production of oil. Thereafter, Defendants Atlantic Richfield and Cities Service, executed said Unit Agreement, Fairway (James Lime) Unit, Henderson and Anderson Counties, Texas, whereby said Defendants purported to include the 82.713 acre tract in the Fairway Unit. No well has ever been drilled on and no production of oil, gas or other minerals has ever been obtained from the 82.713 acre tract.

4.

(a) The attempt of Defendant Atlantic Richfield to pool or combine 80 acres of the 82.713 acre tract covered by the Hilton-Garrett lease into the Melton Unit, containing 160 acres of land, for the production of oil, exceeded the power and authority granted by the pooling clause of the Hilton-Garrett lease, was a nullity, and was ineffective to extend the term of said lease beyond the terminal date of its primary term, August 5, 1961.

(b) The Hilton-Garrett lease terminated on August 5, 1961.

(c) The attempt of Defendants Atlantic Richfield and Cities Service thereafter to pool or combine 2.713 acres of the 82.713 acres of the Hilton-Garrett lease into the Emerson Unit, containing 160 acres, for the production of oil,

was ineffective and a nullity because said lease had terminated or, alternatively, because such attempt exceeded the power and authority granted by the pooling clause of the Hilton-Garrett lease.

(d) The attempt of said Defendants thereafter to include the Hilton-Garrett lease and the 82.713 acre tract covered thereby in the Fairway Unit was ineffective and was a nullity because the Hilton-Garrett lease had theretofore terminated or, alternatively, because such attempt exceeded the power and authority granted by the pooling clause of the Hilton-Garrett lease.

5.

Plaintiffs, but only upon the condition that the relief herein prayed for by Plaintiffs is granted, agree to ratify and confirm the Declaration of the Melton Unit, the Designation of the Emerson Unit and the Unit Agreement for the Fairway (James Lime) Field, all described in Paragraph 1(d) above.

WHEREFORE, Plaintiffs pray that the Defendants (other than Defendant Atlantic Richfield, which is presently before the Court) be cited to appear and answer this Second Amended Original Petition and that, on final hearing, Plaintiffs have judgment against all Defendants

(1) That the Hilton-Garrett lease terminated on August 5, 1961, the date of expiration of the primary term thereof;

(2) removing the cloud cast on Plaintiffs' titles by the Hilton-Garrett lease, the Declaration of the Melton Unit, the Designation of the Emerson Unit and the Unit Agreement, Fairway (James Lime) Unit, Henderson and Anderson Counties, Texas;

(3) for title to and possession of Plaintiffs' respective interests (described in Paragraphs 2(a) and 2(b) above) in the mineral fee estate in the 82.713 acres of land described in Paragraph 2(a), except the royalty interests conveyed by Plaintiffs to the third parties referred to in Paragraph 2(a) above; and

(4) for such other relief, legal or equitable, to which Plaintiffs may justly be entitled, together with all costs of suit.

KLIEWER AND HOOD

By /s/ EDWARD KLIEWER, JR.

Edward Kliewer, Jr.,
2210 Mercantile Bank Building,
Dallas, Texas 75201,
Attorneys for Plaintiffs.

APPENDIX N

Third Amended Answer of Defendant Atlantic Richfield Company After Remand To District Court of Henderson County, Texas.

(State District Court Transcript pps. 33-50)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes ATLANTIC RICHFIELD COMPANY, a corporation, heretofore known as The Atlantic Refining Company, and * * * (only the pertinent parts of this Answer are here shown. This Answer appears in full at pps. 33-50 of the Original Transcript from the state District Court filed in the state Court of Civil Appeals and as a part of the record herein).

1.

This Defendant specially excepts to Plaintiffs' said Petition for the reasons as follows: That in the trial of this case in the United States Court of Appeals for the Fifth Circuit, 327 F. (2) 217, in which W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, were Plaintiffs and this Defendant was the only Defendant, said Plaintiffs, W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, acting by and through their Attorney, Willis D. Moore, urged that all of the royalty owners were indispensable parties, and said Court held, that if this suit resulted in the Hilton et al Lease being declared invalid and removed from the

Unit, that the royalty owners would be denied their right to the oil and gas royalties being produced under said lease and that such constitutes them indispensable parties; and this Defendant further specially excepts to Plaintiffs' said Amended Petition for the reason that Plaintiffs by their said Petition have purported to sue certain Defendants as representatives of a class of the various kinds of royalty owners without making actual Defendants of all of the royalty owners under all the Units which Plaintiffs seek to remove as clouds cast on Plaintiffs' alleged title; that the determination of the validity of said Units referred to in Plaintiffs' said Petition will include as an incident thereto the determination of the right to have received royalties under same prior to as well as presently under the Field-wide Unitization Agreement; and that all of the royalty owners as well as all of the oil and gas leasehold owners under said Units are indispensable parties and in their absence the Court is without jurisdiction of which special exception this Defendant prays judgment of the Court.

(Paragraphs 2, 3, 4 and 5 are omitted)

6.

This Defendant alleges that Plaintiff ought not to recover for the reasons as follows: That while denominated a suit to remove cloud, the claim of Plaintiffs' suit under their Original and First Amended Petitions was that the Hilton-Garrett lease executed by them was invalid for lack of sufficient description of the land, and this was stipulated by Plaintiffs in Paragraph VI and by Exhibits "A" and

"B" attached to the below Pre-Trial Agreement; that in preparation for trial on Plaintiffs' First Amended Petition and while this suit was pending in the United States District Court for the Eastern District of Texas, on July 26, 1962, a Pre-Trial Order in writing was agreed to in open court and signed by Plaintiff Willis D. Moore as the then Attorney for the other Plaintiffs herein and also by the Attorneys for Defendant, Atlantic, and was entered and filed with the papers and as a part of the record in this case; and that said Pre-Trial Order and Agreement has now remained as such for a period of five (5) years.

That said Pre-Trial Order and Agreement also recited the execution of the Hilton-Garrett lease which provided that units pooled for oil shall not substantially exceed 40 acres provided that "should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations".

That by said Pre-Trial Order in Paragraph V(3) it was stipulated and agreed that "the Railroad Commission, Oil and Gas Division, of the State of Texas, on March 4, 1961, promulgated on its Oil and Gas Docket No. 120 its Order No. 6-45,322 adopting rules and regulations for the Fairway (James Lime) Field in Anderson and Henderson Counties, Texas, whereby pooled units for oil were provided for as 80 acres plus a tolerance of 80 acres, making a pooled unit for oil of not more than 160 acres as shown by said Exhibits

below. That on June 12, 1961, the Railroad Commission of Texas entered its Order effective July 1, 1961, merging the West Fairway (James Lime) Field and the West Frankston (James Lime) Field into the Fairway (James Lime) Field, including the adoption of the Fairway Field rules providing for 80 acres proration units plus 80 acres tolerance and not to exceed 160 acres for each oil unit as shown by the below Exhibits and which area includes the land here in controversy".

That said Stipulation under said Pre-Trial Order was the agreement of said parties that they construed said Railroad Commission Order to provide for 160 acre units; that the purpose and meaning was that Plaintiffs agreed, that subject to their claim of lack of sufficient lease description, that in applying the provisions of the Railroad Commission Order to the pooling provisions of the Hilton-Garrett lease, that same provided for units of 160 acres, and to eliminate any contested issue of law or fact in regard to same.

That said Stipulation has now stood as a part of the record in this suit for over five (5) years; that Plaintiffs in Paragraph 3 of their Fourth Amended Petition have now abandoned their claim that said lease was invalid for lack of sufficient description and have alleged that said Hilton-Garrett lease covered the 82.713 acre tract in controversy; and by reason of all of the above Plaintiffs should now be held to be estopped from claiming against this Defendant

that said Railroad Commission Order provided for a different rule, which if applied, would mean that this Defendant had agreed in said Pre-Trial Order that under its lease and said Railroad Commission Order it had no authority to pool to the extent of 160 acre units, and for the reason that such an agreement would have meant this Defendant had agreed that it has exceeded its power to pool to the extent of 160 acres and that this Defendant's lease had terminated regardless of whether or not there was a lack of sufficient lease description.

7.

This Defendant alleges further that Plaintiffs ought not to recover for the reasons as follows: That in addition to the matters alleged in the foregoing Paragraph No. 6 of this Answer, that said Pre-Trial Order and Agreement of July 26, 1962, recited the execution of the Declaration of Unit for the Atlantic-Melton Unit dated and filed June 30, 1961, in Volume 498, Page 389 of the Deed Records of Henderson County, Texas, copies of which were attached as Plaintiffs' Exhibit No. (2) and this Defendant's Exhibit No. (35); that said Declaration of Unit recited the execution of the Hilton-Garrett lease and the Melton-Garrett lease, and recited the construction placed on same that said leases granted the right to pool "to form units of the size permitted or prescribed by the Railroad Commission", and further recited the construction placed on same that "by Order No.

6-45,322 dated March 14, 1961, the Railroad Commission of Texas adopted rules providing for 160 acre spacing for production of oil from the James Lime Field"; that said Unit Declaration then declared that said leases were pooled to form the 160 acre unit therein described.

That by said Pre-Trial Order in Paragraph V(5) it was stipulated and agreed that "on June 30, 1961; The Atlantic Refining Company, reciting itself to be the owner of the above J. W. Melton lease and the W. O. Hilton, et al lease and reciting its pooling powers under said leases and the above Orders of the Railroad Commission, made the Declaration of Unit which was filed on June 30, 1961, in Volume 498, Page 389, of the Henderson County Deed Records, whereby a 160 acre unit was formed for the production of oil from the James Lime Formation and whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly 80 acres from the W. O. Hilton, et al lease, making the total of 160 acres and including what The Atlantic Refining Company claims to be all of the W. O. Hilton, et al land except a 2.713 acre area out of the Southwest portion of said land; that said 2.713 acre area belonging to Plaintiffs and claimed by Defendant under its said lease has been pooled as a part of the Cities Service Oil Company 160 acre Oil Unit adjoining on the South".

That said Stipulation under said Pre-Trial Order was the agreement of said parties that subject to Plaintiffs' claim of lack of sufficient lease description by reasons of which Plaintiffs claimed Defendant Atlantic owned no lease on the

Hilton Tract, that this Defendant had formed by said Unit Declaration a valid unit of 160 acres; that said Stipulation was made to evidence the agreement that said Unit Declaration was valid, and that Plaintiffs made no contest either of law or of fact as to the validity of said Unit, if Plaintiffs' cause of action failed as to the claims of lack of sufficient lease description; that said Stipulation has now stood as a part of the record in this suit for over five (5) years; that Plaintiffs in Paragraph 3 of their Fourth Amended Petition have now abandoned their claim that said lease was invalid for lack of sufficient description and have now alleged that said Hilton-Garrett lease covered the 82.713 acre tract in controversy; that by reason of all of the above Plaintiffs should now be held to be estopped from claiming against this Defendant that said Declaration of Unit was not effective to have pooled to the extent of 160 acres including that portion of the Hilton Tract included in same.

8.

This Defendant alleges further that Plaintiffs ought not to recover for the reasons as follows: That in addition to the matters alleged in the foregoing Paragraphs No. 6 and 7 of this Answer, that by said Pre-Trial Order and Agreement of July 26, 1962, in Paragraph No. VI of same it was stipulated and agreed that the only contested issues of law and fact were those attached as Exhibits "A" and "B" which related only to whether the Hilton-Garrett lease was invalid for lack of sufficient description of the land, and that

this was the ultimate contested issue of law; that said Stipulation was made to evidence the agreement of the parties that no contest existed as to any other issues either of law or of fact; that this Defendant had the right to rely on same and to believe that if Plaintiffs could not recover on Plaintiffs' claim that the lease was invalid for lack of sufficient description, that then this Defendant was entitled to judgment; that this Defendant did rely on and believe said agreement to be in all respects binding on the parties, and this Defendant as the owner of the Well on the Melton Tract and the owner of the Hilton-Garrett lease, and acting under said Declaration Unit, and acting under the provisions for the payment of royalty under said Hilton-Garrett lease and the conveyances below referred by Plaintiffs of royalties thereunder, produced said Well and paid royalties to Plaintiffs' grantees for a period of over 4½ years after the making of said agreement and prior to the filing of Plaintiffs' Second Amended Petition herein on April 20, 1967; that in said Amended Petition and subsequent Amended Petitions Plaintiffs have alleged that the Hilton-Garrett lease did cover Plaintiffs' land, and claimed for the first time that this Defendant exceeded the extent of its authority to pool under said lease; that the above Stipulation, together with the other Stipulations above have now stood as a part of the record in this suit for over five (5) years; that to permit Plaintiffs to now retract their agreements would be to the great damage and injury of this Defendant;

and that by reason of all of the above Plaintiffs should now be held to be estopped from making such claim or any recovery herein as sought in Plaintiffs' amended pleadings; that that since Plaintiffs now admit by their allegations that the description in their Hilton-Garrett lease did cover the land in controversy this Defendant should be awarded judgment.

9.

This Defendant alleges further that Plaintiffs ought not to recover for the reasons as follows: That Plaintiffs knew or were charged with notice of the contents of the Hilton-Garrett lease including the pooling provisions hereinabove quoted; that Plaintiffs knew or were charged with notice of the contents of the Railroad Commission Order No. 6-45,322 dated March 4, 1961, adopting Rules and Regulations for the Fairway (James Lime) Field and Railroad Commission Order dated June 12, 1961, making said Rules and Regulations applicable to the West Fairway (James Lime) Field including the Hilton Tract, and including the provisions hereinabove quoted; that Plaintiffs knew and were charged with notice of the provisions of the Declaration of Unit for the Atlantic-Melton Unit about which they are now complaining including the provisions hereinabove quoted; that notwithstanding same Plaintiffs asserted as their only cause of action for the removal of said unit declaration as a cloud on their title, that said Hilton-Garrett lease was invalid

for lack of sufficient description of the land, and that as a result of same it was claimed this Defendant owned no oil and gas lease covering Plaintiffs' land and, therefore, had no right to pool, and thereby, had clouded Plaintiffs' title on June 30, 1961, by the filing of said Unit Declaration; that acting further in pursuance to the foregoing Plaintiffs by their said Attorney in open court entered into and agreed to the above quoted Pre-Trial Order and Agreement; that the foregoing amounted to a holding out to or representation to the Defendant that, if Plaintiffs' claim that the Hilton-Garrett lease was invalid for lack of sufficient description was without merit, that then this Defendant owned a valid lease and had effectively pooled the land, and that Plaintiffs asserted no other ground for recovery; that by reason of the above Plaintiffs were under the duty to speak and to assert any claim they had as to this Defendant exceeding the extent of its authority to act under the pooling provisions of said lease; that this Plaintiffs failed to do until the filing of their Second Amended Petition on April 20, 1967, over five (5) years later; that this Defendant relying on Plaintiffs' representations and agreements above, and believing that Plaintiffs' claim as to the lease being invalid for lack of sufficient description, to be without merit, this Defendant improved and operated the property and paid royalty to Plaintiffs' grantees for a period of over five (5) years before Plaintiffs filed their Second Amended Petition alleging for the first time that the Hilton-Garrett lease covered the land in controversy, but that this Defendant had exceeded the extent of its authority to pool under same; that to allow

Plaintiffs to now assert that this Defendant exceeded the extent of its authority to pool under the Hilton-Garrett lease would be to the great damage and injury of this Defendant; and that by reason of all of the above, Plaintiffs should now be held to be estopped from making such claim or any recovery herein as sought in Plaintiffs' amended pleadings; and that since Plaintiffs now admit by their allegations that the description in their Hilton-Garrett lease did cover the land in controversy this Defendent should be awarded judgment.

(Paragraphs 10, 11, 12 and 13 are omitted)

WHEREFORE this Defendant prays that Plaintiffs take nothing by this suit and that judgment be rendered in favor of this Defendant and that it recover its costs of suit and that it have such other and further relief to which it may show itself entitled to.

RAMEY, BRELSFORD, FLOCK & DEVEREUX,

By /s/ TOM B. RAMEY, JR.

By /s/ FRANK L. McCLENDON

Citizens First National Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Defendant, Atlantic Richfield Company.

APPENDIX O

Defendants J. W. Melton And Wife Virgie Melton First Amended Answer

(State District Court Transcript pps. 51-61)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now come J. W. MELTON and wife, VIRGIE MELTON, who were first made Defendants in Plaintiffs' Second Amended Petition filed herein on April 20, 1967, and now in answer to Plaintiffs' Fourth Amended Petition file this their First Amended Original Answer and respectfully show the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2. - 7. are omitted)

8.

These Defendants further in behalf of their defense against Plaintiffs' suit adopt by reference and as their own the Answer and defenses filed herein in behalf of Defendant Atlantic Richfield Company.

WHEREFORE these Defendants pray that Plaintiffs take nothing by this suit and that judgment be rendered in favor of these Defendants and that they recover their costs of suit and that they have such other and further relief to which they may show themselves entitled to.

(ATTORNEYS SIGNATURES OMITTED)

APPENDIX P

Defendant C. L. Hanna First Amended Answer

(State District Court Transcript pps. 62-72)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes C. L. HANNA, one of the Defendants in Plaintiffs' Fourth Amended Original Petition filed herein on June 29, 1967, in the above entitled and numbered cause and in answer to Plaintiffs' said Petition files this his First Amended Original Answer and respectfully shows the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2.-8. are omitted.)

9.

This Defendant further in behalf of his defense against Plaintiffs' suit adopts by reference and as his own the Answer and defenses filed herein behalf of Defendant Atlantic Richfield Company.

WHEREFORE this Defendant prays that Plaintiffs take nothing by this suit and that judgment be rendered in favor of this Defendant and that he recover his costs of suit and that he have such other and further relief to which he may show himself entitled to.

(ATTORNEYS SIGNATURES OMITTED)

APPENDIX Q

Defendant Frances Walker McCain First Amended Answer

(State District Court Transcript pps. 73-83)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes FRANCES WALKER MCCAIN, who was first made a Defendant in Plaintiffs' Second Amended Petition filed herein on April 20, 1967, and now in answer to Plaintiffs' Fourth Amended Petition files this her First Amended Original Answer and respectfully shows the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2. - 8. are omitted.)

9.

This Defendant further in behalf of her defense against Plaintiffs' suit adopts by reference and as her own the Answer and defenses filed herein in behalf of Defendant Atlantic Richfield Company.

WHEREFORE this Defendant prays that Plaintiffs take nothing by this suit and that judgment be rendered in favor of this Defendant and that she recover her costs of suit and that she have such other and further relief to which she may show herself entitled to.

(ATTORNEYS SIGNATURES OMITTED)

APPENDIX R

Defendant Edson Petroleum Company First Amended Answer

(State District Court Transcript pps. 84-94)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes EDSON PETROLEUM COMPANY, a corporation, who was first made a Defendant in Plaintiffs' Second Amended Petition filed herein on April 20, 1967, and now in answer to Plaintiffs' Fourth Amended Petition files this its First Amended Original Answer and respectfully shows the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2. - 8. are omitted.)

9.

This Defendant further in behalf of its defense against Plaintiffs' suit adopts by reference and as its own the Answer and defenses filed herein in behalf of Defendant Atlantic Richfield Company.

WHEREFORE this Defendant prays that Plaintiffs take nothing by this suit and that judgment be rendered in favor of this Defendant and that it recover its costs of suit and that it have such other and further relief to which it may show itself entitled to.

(ATTORNEYS SIGNATURES OMITTED)

APPENDIX S

Defendants Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee For Empire Trust Company and Empire Trust Company First Amended Answer

(State District Court Transcript pps. 95-105)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now Come SOUTHEASTERN PUBLIC SERVICE COMPANY, a corporation, DOMINO CORPORATION, WILLIAM G. WEBB, Trustee for Empire Trust Company, and EMPIRE TRUST COMPANY, a banking corporation, who were first made Defendants in Plaintiffs' Fourth Amended Petition filed herein on June 29, 1967, and now in answer to Plaintiffs' Fourth Amended Petition file this their First Amended Original Answer and respectfully show the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2. - 8. are omitted.)

9.

These Defendants further in behalf of their defense against Plaintiffs' suit adopt by reference and as their own the Answer and defenses filed herein in behalf of Defendant Atlantic Richfield Company.

WHEREFORE these Defendants pray that Plaintiffs take nothing by this suit and that judgment be rendered in favor of these Defendants and that they recover their costs of suit and that they have such other and further relief to which they may show themselves entitled to.

(ATTORNEYS SIGNATURES OMITTED)

APPENDIX T

Defendants E. Fred Herschbach, Frederick J. Herschbach and Robert A. Herschbach, First Amended Answer

(State District Court Transcript pps. 106-116)

(Number and title omitted) (Filed Sept. 26, 1967)

To the Honorable Judge of Said Court:

Now Come E. Fred Herschbach, Frederick J. Herschbach and Robert A. Herschbach, who were first made Defendants in Plaintiffs' Fourth Amended Petition filed herein on June 29, 1967, and now in answer to Plaintiffs' said Petition file this their First Amended Original Answer and respectfully show the Court as follows:

(Paragraph No. 1 is same as No. 1 in Atlantic's Third Amended Answer and Paragraphs 2. - 8. are omitted.)

9.

These Defendants further in behalf of their defense against Plaintiffs' suit adopt by reference and as their own the Answer and defenses filed herein in behalf of Defendant Atlantic Richfield Company.

Wherefore these Defendants pray that Plaintiffs take nothing by this suit and that judgment be rendered in favor of these Defendants and that they recover their costs of suit and that they have such other and further relief to which they may show themselves entitled to.

(Attorneys Signatures Omitted)

APPENDIX U

Motion For Summary Judgment Of Atlantic Richfield Company In District Court Of Henderson County, Texas

(Original Motion sent up as part of the record.)

(Number and title omitted) (Filed Sept. 26, 1967)

To the Honorable Judge of Said Court:

NOW COMES Defendant Atlantic Richfield Company and pursuant to Rule 166-A files this its Motion for Summary Judgment against the Plaintiffs and respectfully shows the Court as follows:

1.

(Omitted)

2.

That by reason of the pleadings herein, the depositions, the admissions on file, the attached affidavits, and the other matters hereinafter set out, this Defendant shows that there is no genuine issue as to any material fact as to the defenses below of this Defendant and that this Defendant is entitled to judgment as a matter of law by reason of its defenses alleged in its Third Amended Answer as follows:

(1) (Omitted)

(2) Under Paragraph No. 6 of its Answer this Defendant's defense is that subject to Plaintiffs' claims that the Hilton-Garrett lease was invalid for lack of sufficient description of the land, that by Pre-Trial Order and Agreement made in

open court on July 26, 1962, by Plaintiffs and this Defendant, that Plaintiffs agreed that the Railroad Commission Order No. 6-45,322, dated March 4, 1961, was construed by the parties as providing for units for oil of 80 acres plus a tolerance of 80 acres, making 160 acres, and that Plaintiffs by reason of said agreement are now estopped to claim said Railroad Commission Order provided otherwise and are estopped to claim that this Defendant exceeded the extent of the authority granted by the pooling clause of said Hilton-Garrett lease; and that since Plaintiffs have now alleged in their Amended Petition that the Hilton-Garrett lease did cover the W. O. Hilton, et al. 82.713 acre tract, this Defendant is entitled to judgment; and

(3) Under Paragraph No. 7 of its Answer this Defendant's defense is that, subject to Plaintiffs' claim that the Hilton-Garrett lease was invalid for lack of sufficient description of the land, that by Pre-Trial Order and Agreement made in open court on July 26, 1962, by Plaintiffs and this Defendant that Plaintiffs agreed that by the Declaration of Unit for the Atlantic-Melton Unit dated and filed June 30, 1961, in Volume 498, Page 389 of the Deed Records of Henderson County, Texas, there was pooled 80 acres of the J. W. Melton lease and 80 acres of the W. O. Hilton, et al lease, making 160 acres, which was the unit known as the Atlantic-Melton Unit, and that the 2.713 acres constituting the balance of the W. O. Hilton, et al 82.713 acre tract and claimed by this Defendant was pooled as a part of the Cities Service-Emerson Unit; that Plaintiffs by reason of said agreement are now estopped to claim that said Hilton-Garrett lease

was not pooled as above and are estopped to claim that this Defendant exceeded the extent of the authority granted by the pooling clause of said Hilton-Garrett lease; and since Plaintiffs have now alleged in their Amended Petition that the Hilton-Garrett lease did cover the W. O. Hilton, et al 82.713 acre tract, this Defendant is entitled to judgment; and

(4) Under Paragraph No. 8 of its Answer this Defendant's defense is that, subject to Plaintiffs' claim that the Hilton-Garrett lease was invalid for lack of sufficient description of the land, that by Pre-Trial Order and Agreement made in open court on July 26, 1962, by Plaintiffs and this Defendant, that Plaintiffs agreed that the only contested issues of law and fact were those which related to whether the Hilton-Garrett lease was invalid for lack of sufficient description of the land; that Plaintiffs have now in their Amended Petition alleged that the Hilton-Garrett lease did cover the W. O. Hilton, et al 82.713 acre tract; that Plaintiffs by reason of said agreement and their allegation that said lease did cover said tract are now estopped to claim that any other issues, either of law or of fact, exist between the parties other than issues relating to whether the Hilton-Garrett lease was invalid for lack of sufficient description.

(Paragraphs 3. - 5. including references to Exhibits are omitted.)

WHEREFORE this Defendant prays that the Court grant and enter in its favor a summary judgment in accordance with the foregoing and that the Court decree and adjudge that the Plaintiffs take nothing by reason of their suit against this Defendant, and that this Defendant recover its costs,

and for such other and further relief, both general and special, as the Court may deem it to be entitled to, and that if judgment is not so granted that the Court order that the case shall proceed to a regular trial on the defenses alleged herein and in this Defendant's Third Amended Answer filed herein.

RAMEY, BRELSFORD,
FLOCK & DEVEREUX,

By /s/ TOM B. RAMEY, JR.

By /s/ FRANK L. McCLENDON

Citizens First National Bank
Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Defendants,
Atlantic Richfield Company.

(AFFIDAVIT OMITTED)

APPENDIX V

Motion For Summary Judgment By John W. Melton, Et Al, Filed In the District Court Of Henderson County, Texas

(Original Motion sent up as part of the record.)

(Number and title omitted) (Filed Sept. 26, 1967)

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes Defendants, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Frederick J. Herschbach, and Robert A. Herschbach, and pursuant to Rule 166-A file this their Motion for Summary Judgment against Plaintiffs and respectfully show the Court as follows:

1.

(Omitted)

2.

These Defendants hereby join in and adopt as their own the same as if they were named therein the Motion for Summary Judgment together with the Exhibits attached, which has been filed herein in behalf of Defendant, Atlantic Richfield Company.

(Paragraphs 3. - 6. including Exhibits are omitted.)

Wherefore these Defendants pray that the Court grant and enter in their favor a summary judgment in accordance

with the foregoing and that the Court decree and adjudge that the Plaintiffs take nothing by reason of their suit against these Defendants, and that these Defendants recover their costs, and for such other and further relief, both general and special, as the Court may deem them to be entitled to, and if judgment is not so granted that the Court order that the case shall proceed to a regular trial on the defenses alleged herein and in these Defendants' Amended Answers filed herein.

RAMEY, BRELSFORD,
FLOCK & DEVEREUX,

By /s/ TOM B. RAMEY, JR.

By /s/ FRANK L. McCLENDON

Citizens First National Bank
Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Defendants.

(AFFIDAVIT OMITTED)

APPENDIX W

Judgment Entered By District Court of Henderson County, Texas After Remand

(State District Court Transcript pps. 124-128)

(Number and title omitted) (Filed April 2, 1968)

On the 6th day of October, 1967, came on to be heard the Motion, filed in this Cause by all Plaintiffs herein, for entry of a Summary Judgment in Plaintiffs' favor against all Defendants in this Cause, and also came on to be heard the Motions for entry of Summary Judgment against Plaintiffs filed in this Cause by the Defendants, Atlantic Richfield Company, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Frederick J. Herschbach, Robert A. Herschbach, and Centenary College of Shreveport, Louisiana; and it appearing to the Court that all Defendants named individually and as representatives of a class in this Cause have been duly and timely served with process and (with the exception of C. S. McCain, Jr., and J. L. Wilcox who, having disclaimed any interest in the subject matter of this action, are hereby dismissed as Defendants herein) are presently before the Court; that the Court has jurisdiction of the subject matter of and of all parties to this suit; that Plaintiffs' Motion for Summary Judgment and the Motions for Sum-

mary Judgment filed by the above-named Defendants are each made in proper form and time; that proper service thereof has been made upon all parties, and the Court having considered the pleadings, depositions and admissions on file, together with the supporting affidavits filed by the respective Movants, and finding that the same show that there is no genuine issue as to any material fact, that Plaintiffs are entitled to judgment as a matter of law against all Defendants (except those who, having disclaimed, have been dismissed) and that as a matter of law the Motions for Summary Judgment filed by the above-named Defendants should be denied;

It is therefore ORDERED, ADJUDGED and DECREED that W. O. Hilton and wife, Malvrin Hilton, L. A. McCoy and wife Ila Mae McCoy, and Willis D. Moore, Plaintiffs herein, do have and recover, and there is hereby rendered in favor of said Plaintiffs, against Atlantic Richfield Company, Cities Service Oil Company, Fred M. Garrett, Edson Petroleum Company, H. P. Riley, James A. Latham, Elise M. Young, Cornelia McCain, Frances Walker McCain, Herbert Wilcox, J. W. Melton and wife, Virgie Melton, C. E. Willingham, Harve A. Thomas, Henry Moore, III, Commercial Investment Company, John D. Janicek, Bettye V. Gray, Centenary College of Shreveport, Caddo Parish, Louisiana, W. S. Day, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, Ralph E. Graham, E. Fred Herschbach, Frederick J. Herschbach, Robert A. Herschbach, and C. L.

Hanna, the Defendants herein, each individually and as joint and several representatives of each and all classes composed of all of the persons and entities who own or claim to own any interests of any character in the mineral fee estate in the lands attempted to be included in the Melton Unit, the Emerson Unit and the Fairway Unit (such Units being particularly described below), judgment as follows:

(1) that the oil, gas and mineral lease dated August 5, 1951, executed by W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, as Lessor, to B. L. Garrett, as Lessee, recorded in Volume 373, Page 255, Deed Records, Henderson County, Texas (the "Hilton-Garrett lease"), covering the 82.713 acre tract of land described in (3) below, terminated on August 5, 1961, the date of expiration of the primary term thereof;

(2) that the cloud cast on Plaintiffs' titles to the 82.713 acre tract described in (3) below by the Hilton-Garrett lease, by the Declaration of Unit (the "Melton Unit") executed by The Atlantic Refining Company, dated June 30, 1961, recorded in Volume 498, Page 389, Deed Records, Henderson County, Texas, by the Designation of Unit (the "Emerson Unit") executed by Cities Services Petroleum Company and The Atlantic Refining Company, dated February 5, 1962, recorded in Volume 511, Page 105, Deed Records, Henderson County, Texas, and by the Unit Agreement, Fairway (James Lime) Unit, Henderson and Anderson Coun-

ties, Texas (the "Fairway Unit") dated as of October 1, 1963, recorded in Volume 580, Page 405, Deed Records, Henderson County, Texas, shall be and said cloud is hereby removed;

(3) that Plaintiffs W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, recover of and from Defendants herein the title and possession of the mineral fee estate in the following described 82.713 acres of land located in the Alfred Benge Survey, Abstract No. 57, Henderson County, Texas:

BEGINNING at the Northeast corner of 57.978 acre tract standing in the name of Larkin Smith, et al.;

THENCE North 81 deg. 06.1 min. West 1216.21 feet with the North line of said Smith tract and the North line of the Clifford Emerson 40 acre tract to a point for corner;

THENCE North 08 deg. 33.2 min. West to a point for corner in the North Boundary line of said ALFRED BENGE SURVEY and also in the South Boundary Line of the JOHN RACHEL SURVEY, A-622, said point being in the middle of a public road;

THENCE South 81 deg. 41.7 min. East along the North Boundary Line of said Benge Survey and the South Boundary Line of said Rachel Survey to a point for corner 2959.8 feet North 09 deg. 45.85 min. East of the place of beginning;

THENCE South 0 deg. 45.85 min. West 2959.8 feet to the place of BEGINNING, and containing 82.713 acres of land, more or less;

(except, however, the royalty interests in said land heretofore conveyed to others by Plaintiffs, W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, which royalty interests are not in issue in this action), subject only to the two oil, gas and mineral leases described below in this (3); and that Plaintiff, Willis D. Moore, recover from Defendants herein the title and possession of the oil, gas and mineral leasehold estate in said 82.713 acre tract created by the two oil, gas and mineral leases executed by the other Plaintiffs herein to Willis D. Moore, each dated June 1, 1961, recorded, respectively, in Volume 600, Pages 443 and 445, Deed Records, Henderson County, Texas; and

(4) for all costs of suit, which are taxed solely against the Defendant, Atlantic Richfield Company.

And it is FURTHER ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment filed herein by Defendant shall be and the same are hereby denied and overruled, as well as the special exceptions contained in the various answers of the Defendants.

To which action of the Court all of the Defendants, in open court, excepted and gave notice of appeal to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler, Texas.

Rendered and signed this 2nd day of April, 1968.

/s/ R. W. LAWRENCE

District Judge

APPENDIX X

Points Of Error Nos. 1, 2, 3 and 7 Made In Brief Of Atlantic Richfield Company Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas.

(Original brief sent up as part of record from state Court of Civil Appeals for purpose of showing said points.)

(Number and title omitted) (Filed June 28, 1968)

To the Honorable Court of Civil Appeals:

Now comes Atlantic Richfield Company formerly known as The Atlantic Refining Company, one of the Appellants, and by this appeal shows that the Trial Court erred in granting Appellees W. O. Hilton, et al's Motion for Summary Judgment and in denying Appellant Atlantic's Motion for Summary Judgment and that this case should be reversed and rendered in favor of Appellants or else remanded to the Trial Court, by reason of the following:

ATLANTIC RICHFIELD COMPANY'S POINTS OF ERROR

Point of Error No. 1

The trial court erred in refusing to hold the stipulations made in federal court were an agreed construction that the Railroad Commission orders provided for 160 acre units and operated under the Hilton-Atlantic lease as an agreement said lease authorized 160 acre units and as such and under the judgment remanding the case estopped appellees from asserting Atlantic exceeded the authority granted by the pooling clause in said lease, and additionally Appellees waived said right.

Point of Error No. 2

The trial court erred in refusing to hold the stipulations made in federal court were an agreement the unit declaration by Atlantic pooled 80 acres from the Melton tract and 80 acres from the Hilton tract making 160 acres, and operated as a ratification of the unit and as such and under the judgment remanding the case estopped Appellees from asserting Atlantic exceeded the pooling powers in the Hilton-Atlantic lease, and additionally Appellees waived said right.

Point of Error No. 3

The trial court erred in refusing to hold the stipulations made in federal court were an agreement that the only contested issues in the case were those relating to whether the Hilton-Atlantic lease was invalid for lack of sufficient lease description, and said stipulations never having been set aside operated as an agreement Appellees had no other claim against Atlantic, and as such and under the judgment remanding the case estopped Appellees from asserting Atlantic exceeded the pooling powers in the Hilton-Atlantic lease, and additionally Appellees waived said right.

Points of Error Nos. 4, 5 and 6

(Omitted)

Point of Error No. 7

The trial court erred in refusing to hold that under the judgment remanding the case to make parties, Appellees were required to make the royalty owners defendants as real parties at interest, and having made them only nominal parties defendant as to whose title it was alleged there was

no issue, and by having sued some by a class action only, Appellees were not entitled to judgment.

(Remainder of Brief omitted)

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
TOM B. RAMEY, JR.,
FRANK L. McCLENDON,

By /s/ FRANK L. McCLENDON

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Appellant,
Atlantic Richfield Company.

APPENDIX Y

Adoption By John W. Melton, Et Al Of Points Of Error Nos. 1, 2, 3 And 7 Made By Atlantic Richfield Company In Brief Filed In Court Of Civil Appeals, 12th Supreme Judicial District Of Texas.

(Original Brief Adopting Said Points Of Error Sent Up As Part Of Record From Said Court Of Civil Appeals For Purpose Of Showing Adoption Of Said Points Of Error.)

(Number and title omitted) (Filed June 28, 1968)

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now Come Appellants, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Frederick J. Herschbach and Robert A. Herschbach. and by this appeal show that the Trial Court erred in granting Appellees, W. O. Hilton's, et al's Motion for Summary Judgment and in denying these Appellants Motion for Summary Judgment, and that this case should be reversed and rendered in favor of Appellants, or else remanded to the Trial Court by reason of the following:

These Appellants are royalty owners and hereby join in and adopt as their own the same as if they were named

therein the Brief of Appellant, Atlantic Richfield Company, filed herein in support of its appeal.

(Remainder of this brief omitted)

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON,

By /s/ FRANK L. MCCLENDON

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for said Appellants.

APPENDIX Z

Motion For Rehearing Of Appellant Atlantic Richfield Company Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas

(Original Sent Up As Part Of Record From State Court Of Civil Appeals)

(Number and title omitted) (Filed Feb. 12, 1969)

To the Honorable Court of Civil Appeals:

Now comes Appellant, Atlantic Richfield Company, and respectfully moves the Court to set aside the Judgment of this Court rendered on January 30, 1969 affirming the Trial Court's Judgment in granting Appellees' Motion for Summary Judgment and in refusing to reverse and render judgment in favor of Appellant that Appellant's Motion for Summary Judgment be granted, and refusing in the alternative to reverse and remand this case to the Trial Court, and Appellant moves this Court to grant it a rehearing and upon rehearing to reverse and render judgment in favor of Appellant or else remand this case to the Trial Court, and in this connection Appellant asserts that this Court erred in overruling each of Appellant's Points of Error as below set forth, and that this Court erred in each of the holdings of this Court as set forth below, and respectfully shows the Court as follows:

POINT OF ERROR NO. 1

This Court erred in affirming the judgment of the Trial Court in holding that the Stipulation made long before the holding in Jones v. Killingsworth and without regard to whether part of the acreage was prescribed and part per-

mitted and whereby it was agreed that the Railroad Commission Orders adopted regulations whereby pooled units for oil were provided for of 160 acres, did not operate under the Hilton-Atlantic lease as an estoppel against Appellees thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 2

This Court erred in affirming the judgment of the Trial Court in holding the Stipulation made long before the holding in Jones v. Killingsworth wherein it was agreed that the Railroad Commission Orders adopted regulations whereby pooled units for oil were provided for of 160 acres, involved a question of law and that the parties could not agree that they so construed said Orders or that said Stipulation applied to the Hilton-Atlantic lease pooling provisions operated as an agreement said lease authorized pooled units of 160 acres so as to estop Appellees from thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 3

This Court erred in affirming the judgment of the Trial Court in holding that the Stipulation made, subject to Appellees' claim the lease description was insufficient, that the Declaration of Unit for the Atlantic-Melton 160 acre Unit was filed whereby a 160 acre unit was formed pooling exactly 80 acres from the Melton Lease and exactly 80 acres from the Hilton Lease and stipulating the remaining 2.713 acres of the Hilton Tract has been pooled as a part of the Cities Service Oil Company 160 acre Unit, did not operate under the Hilton-Atlantic lease as an estoppel against Appellees thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 4

This Court erred in affirming the judgment of the Trial Court in holding that the Stipulation made that the Dec-

laration of Unit for the Atlantic-Melton 160 acre Unit pooled 80 acres from the Melton Lease and 80 acres from the Hilton Lease and that the remaining 2.713 acres of the Hilton Tract has been pooled as a part of the Cities Service Oil Company 160 acre Unit involved a question of law that the parties could not agree to so as to operate under the Hilton-Atlantic lease as an estoppel against Appellees thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 5

The Court erred in affirming the judgment of the Trial Court since the Atlantic-Melton 160 acre Unit Declaration recited the Hilton-Atlantic lease granted the right and power to pool same "to form units of the size permitted or prescribed by the Railroad Commission" and since the parties Stipulated that said Unit Declaration was filed whereby a 160 acre unit was formed consisting of 80 acres from said Hilton-Atlantic lease and 80 acres from the J. W. Melton lease, this Court erred for the reason that the foregoing constituted the Stipulation of the parties that the Hilton-Atlantic lease authorized Appellant to pool "to form units of the size permitted or prescribed by the Railroad Commission" and thereby Appellees were estopped from asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 6

The Court erred in affirming the judgment of the Trial Court and in holding that the Stipulations made, subject to Appellees' claim the lease description was insufficient, that the Atlantic-Melton 160 acre Unit was formed pooling 80 acres from the Hilton-Atlantic lease and 80 acres from the Melton lease and stipulating the remaining 2.713 acres of the Hilton tract was pooled as a part of the Cities Service Oil Company 160 acre Unit were stipulations as to the construction and legal effect of the Hilton-Atlantic lease and as such were not binding on the Court or the parties, and in

this the Court erred for the reason that said stipulations were not stipulations as to what the law was but were stipulations resolving the private property rights of the parties, and the effect of this Court's holding was that if a question of law is involved the parties could not stipulate and settle their private property rights between themselves by agreeing that the land was pooled and thereby make it unnecessary for the Court to determine what was or was not the law as to whether the land was validly pooled under the terms of said lease.

POINT OF ERROR NO. 7

This Court erred in affirming the judgment of the Trial Court and in holding where, subject to their claim the lease description was insufficient, Appellees made the Stipulation that the Hilton-Atlantic lease was pooled, that same did not operate under the Hilton-Atlantic lease as a ratification of the Atlantic-Melton 160 acre Unit subject to Appellees' claim as to the insufficiency of the lease description and estop Appellees from thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in the Hilton-Atlantic lease.

POINT OF ERROR NO. 8

This Court erred in affirming the judgment of the Trial Court and in holding where Appellees in Federal Court, subject to their claim the lease description was insufficient, made the Stipulation that the Hilton-Atlantic lease was pooled and asserted to the Court it was pooled and procured a reversal and remand to the State Court on the ground the royalty owners in the Hilton and Melton Tracts were indispensible parties defendant whose interests would be injuriously affected if the lease were removed from the Unit, that Appellees were not estopped from thereafter asserting in State Court that said lease was not pooled because Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 9

This Court erred in affirming the judgment of the Trial Court and in holding that the Stipulations made that the land was pooled, subject to Appellees' claim the lease description was insufficient, and that the only contested issues in the case related to whether the Hilton-Atlantic lease was invalid for lack of sufficient description of the land did not operate as an agreement by Appellees that they did not have any other claim and did not make any other claim against Appellant as to the invalidity of said lease and that said Stipulations did not estop Appellees from thereafter asserting Appellant exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 10

This Court erred in affirming the judgment of the Trial Court and in holding where Appellees made the Stipulations that the Hilton-Atlantic lease was pooled and that the only contested issues in the case related to the insufficiency of the lease description, that same did not operate under said lease as a waiver of any rights on the part of Appellees to thereafter assert Appellant exceeded the extent of the authority granted by the pooling clause in the Hilton-Atlantic lease.

POINT OF ERROR NO. 11

This Court erred in affirming the judgment of the Trial Court and in holding, where Appellees had stipulated in Federal Court, subject to their claim the lease description was insufficient, that the Hilton-Atlantic lease had been pooled, that since Appellees had also stipulated the only basis of their recovery was the insufficiency of the lease description, that there were no contested fact issues involved and the issue before the Federal Court as to insufficiency of the lease description involving only a question of law that the Stipulation made at the same time that said lease had been pooled was not binding on the parties so as to estop Appellees from thereafter asserting Appellant had exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 12

This Court erred in affirming the judgment of the Trial Court and in holding that the Stipulations approved by the Federal Court agreeing that the Unit Declarations pooled the Hilton-Atlantic lease and agreeing that the only contested issues related to the insufficiency of the lease description were Stipulations as to what the law was and not binding on the parties or the Court, and in this the Court erred for the reasons said Stipulations were not Stipulations as to what the law was, but were Stipulations relating to the private property rights of the parties whereby it was agreed the acts of making and filing the Unit Declarations did pool said lease and that no other controversy existed between the parties in regard to same.

POINT OF ERROR NO. 13

This Court erred in affirming the judgment of the Trial Court and in holding where Appellees had stipulated the Hilton-Atlantic lease was pooled and in Federal Court had procured a reversal and remand of the case on the ground said lease was pooled, that since there was no claim the lease was ambiguous, the Stipulations that said lease was pooled involved only a question of law and that Appellees were not barred or foreclosed from thereafter in State Court amending their pleadings and asserting said lease was not pooled and had terminated under the long thereafter decided Jones v. Killingsworth case in that Appellant had exceeded the extent of the authority granted by the pooling clause in said lease.

POINT OF ERROR NO. 14

This Court erred in affirming the judgment of the Trial Court and in refusing to render judgment in favor of Appellant on the basis of its Motion for Summary Judgment because, by virtue of the Stipulations in the Pre-Trial Order in Federal Court and particularly those in Paragraph V (5) agreeing the only contested issues related to the insufficiency of the lease description, the parties as a matter of law con-

tracted and agreed that the Hilton-Atlantic lease was properly pooled into 160 acre Units.

POINT OF ERROR NO. 15

This Court erred in affirming the judgment of the Trial Court and in refusing to render judgment in favor of Appellant on the basis of its Motion for Summary Judgment because, by virtue of the Stipulations in the Pre-Trial Order in Federal Court and particularly those in Paragraphs V (5) and VI, as a matter of law Appellant was entitled to judgment granting its Motion for Summary Judgment.

(Points of Error Nos. 16-39 are omitted)

POINT OF ERROR NO. 40

This Court erred in affirming the judgment of the Trial Court and in refusing to remand the case for the reason that in the alternative Appellant asserted that under the Judgment of the Federal Court of Appeals remanding the case to make indispensible parties defendant, and which judgment required Appellees to make indispensible parties of the royalty owners who Appellees asserted in their Motion to Remand were indispensible parties, and in which judgment, said royalty owners were held to be indispensible parties defendant because if the Hilton-Atlantic lease were removed from the unit said lease would terminate thereby terminating the rights of said royalty owners under said lease, and the Court erred for the reason that under said Judgment Appellees were required to make said royalty owners defendants as real and indispensible parties at interest and this Appellees failed to do since they made said royalty owners only nominal parties defendant as to whose title Appellees alleged that "the title to which royalty interests is not an issue in this action", and as to which royalty interests Appellees in their prayer stated were excepted from any recovery by Appellees for title and possession, thus making said royalty owner parties defendant as parties whose presence in the lawsuit was not indispensible to a valid judgment.

This Appellant respectfully prays that this Motion be granted, and that the judgment herein previously rendered on January 30, 1969, be set aside, and that the judgment of the Trial Court be reversed and that Judgment be rendered in favor of Appellant, or else that this case be remanded to the State Court for further action.

(Paragraph omitted)

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON,

By /s/ FRANK L. MCCLENDON

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Appellant,
Atlantic Richfield Company.

APPENDIX Z-1

Motion For Rehearing Of Appellants John W. Melton, Et Al Filed In The Court Of Civil Appeals, 12th Supreme Judicial District Of Texas.

(Original Sent Up As Part Of Record From State Court of Civil Appeals)

(Number and title omitted) (Filed Feb. 12, 1969)

TO THE HONORABLE COURT OF CIVIL APPEALS:

Now come Appellants, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Frederick J. Herschbach, and Robert A. Herschbach, and respectfully move the Court to set aside the Judgment of this Court rendered on January 30, 1969 affirming the Trial Court's Judgment in granting Appellees' Motion for Summary Judgment and in refusing to reverse and render judgment in favor of these Appellants that these Appellants' Motion for Summary Judgment be granted, and refusing in the alternative to reverse and remand this case to the Trial Court, and these Appellants move this Court to grant them a rehearing and upon rehearing to reverse and render judgment in favor of these Appellants or else remand this case to the Trial Court, and in this connection these Appellants assert that this Court erred in overruling each of Appellants' Points of Error as below set forth, and that this Court erred

in each of the holdings of this Court as set forth below, and respectfully shows the Court as follows:

(Note: The Points of Error made in behalf of these parties are the same as Points of Error Nos. 1-15 and No. 40 made in the Motion for Rehearing filed in behalf of Atlantic Richfield Company and shown in this appendix. For brevity and convenience of the Court, said Points of Error are referred to and not here repeated.)

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON,

By /s/ FRANK L. MCCLENDON

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701,
Attorneys for Appellants.

APPENDIX Z-2

Points Of Error Nos. 1, 2, 3, 4 and 13 In Application For Writ Of Error Filed In Supreme Court Of Texas By Petitioners Atlantic Richfield Company, Et Al.

(Certified copy of Application for Writ of Error sent up as part of record from state Court of Civil Appeals and Supreme Court of Texas.)

(Number and title omitted) (Filed Mar. 19, 1969)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Come now Petitioner Atlantic Richfield Company, previously known as The Atlantic Refining Company, hereinafter called Atlantic, and Petitioners John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Herschbach, Frederick J. Herschbach, and Robert A. Herschbach, who were Defendants in the Trial Court and Appellants in the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas at Tyler in Cause No. 402, Atlantic Richfield Company et al, *Appellants v. W. O. Hilton and wife,* Malvirin Hilton and L. A. McCoy and wife, Ila Mae McCoy, and Willis D. Moore, Appellees in said cause and who are Respondents herein, and Petitioners petition this Court to issue Writ of Error to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas to the end that the record in the Cause and the Judgment of the Court of Civil Appeals may be brought before

this Court for review and correction of errors of said Court. In support of this Application, Petitioners respectfully show the Court as follows:

(Note: Only Petitioners' Points of Error above referred to are shown since the remainder of the Brief is not considered to be here necessary.)

PETITIONERS' POINTS OF ERROR

Point of Error No. 1

The Court of Civil Appeals erred in holding that the pretrial Stipulations previously entered when this case was in Federal Court were Stipulations "with respect to the construction and legal effect" of an unambiguous contract which was "not binding on either the Court or the parties." Quite to the contrary, the Stipulations here involved only private property rights and the parties' own interpretation of their personal contract about which said parties were free to stipulate, contract and agree as they might choose. (Germane to Points of Error Nos. 2, 4, 6, 11, 12 and 13 in Motions for Rehearing.)

Point of Error No. 2

The Court of Civil Appeals erred in affirming the Judgment of the Trial Court and in refusing to render Judgment for Petitioners on the basis of their Motions for Summary Judgment because by virtue of the Stipulations between the parties made and filed in this cause while pending in Federal Court, the parties contracted and agreed that the Hilton Tract was properly pooled under the provisions of the Hilton-Atlantic Lease, thereby estopping Respondents from thereafter contending to the contrary. (Germane to Points of Error Nos. 1, 3, 5, 9, 14 and 15 in Motions for Rehearing).

Point of Error No. 3

The Court of Civil Appeals erred in affirming the Judgment of the Trial Court and in refusing to render Judgment

for the Petitioners on the basis of their Motions for Summary Judgment because the Stipulations in Federal Court in regard to the Unit Declarations operated under the Hilton-Atlantic lease as a ratification of such Unit Declarations. (Germane to Points of Error No. 7 in Motions for Rehearing).

Point of Error No. 4

The Court of Civil Appeals erred in affirming the Judgment of the Trial Court and in refusing to render Judgment for the Petitioners on the basis of their Motions for Summary Judgment because Respondents estopped themselves from asserting that Atlantic had exceeded its pooling authority under the Hilton-Atlantic Lease when, in Federal Court, they stipulated that said lease "was pooled" and procured a reversal of an adverse judgment against them upon the theory that the Royalty Owners under the pooled tracts were indispensable parties to the litigation. (Germane to Points of Error No. 8 in Motions for Rehearing).

Point of Error No. 13

The Court of Civil Appeals erred in affirming the Judgment of the Trial Court and in refusing to remand the case and require Respondents to make real and indispensable parties defendant of the Royalty Owners instead of nominal parties as to whose title Respondents alleged was "not an issue in this action" and against whom no recovery was sought. (Germane to Points of Error Nos. 40 in Motions for Rehearing).

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Application for Writ of Error be granted and, upon final hearing, that the Judgment of the Court of Civil Appeals and the Trial Court be reversed, and that judgment be rendered in favor of Petitioners or, in the alternative, that said Judgments be reversed and this cause be remanded for an-

other trial. Petitioners additionally pray for such other and further relief to which they may be justly entitled at law or in equity.

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
MIKE A. HATCHELL,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON,

By /s/ FRANK L. MCCLENDON

Attorneys for Petitioners

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701.

APPENDIX Z-3

Assignments Of Error Nos. I, III and V in Motion For Rehearing Filed In Supreme Court Of Texas By Petitioners Atlantic Richfield Company, Et Al

(Certified Copy from the Supreme Court of Texas sent up as part of record from State Court of Civil Appeals and Supreme Court of Texas.)

(Number and title omitted) (Filed May 22, 1969)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes now Petitioner, Atlantic Richfield Company, and Petitioners, John W. Melton and wife, et al, and move the Court to set aside its order rendered and entered May 7, 1969, whereby Petitioners' Application for Writ of Error was refused with the notation "No Reversible Error," and, upon rehearing, to grant said Application and, upon final hearing, to reverse the judgment of the Court of Civil Appeals and the trial court, and to render judgment for Petitioners, or, in the alternative, to remand this cause for trial on the merits.

As grounds for their Motion, Petitioners would respectfully show the Court as follows:

ASSIGNMENTS OF ERROR

I.

The Court has erred in refusing to grant Petitioners' Application for Writ of Error on the basis of Points of Error Nos. 1-5, because, by virtue of the pre-trial stipulations in this cause in Federal Court, Respondents contracted and

agreed that the Hilton Tract was properly pooled with the Melton Tract under the terms of the Hilton-Atlantic Lease and, indeed, even secured a reversal of an adverse judgment against them predicated upon the validity of said pooling provisions and the Unit Declaration thereunder. Since those stipulations were freely entered, were binding, and have never been retracted, Respondents are bound by the same and estopped to deny that the pooling provisions of the Hilton-Atlantic Lease were exceeded by declaration of the Hilton-Melton Unit.

II.

(Omitted.)

III.

The Court has erred in refusing to grant Petitioners' Application for Writ of Error on the basis of Point of Error No. 13, because the lower Courts fundamentally erred in terminating valuable property rights of the Royalty Owners when Respondents affirmatively alleged that said Royalty Owners title "was not in issue in this action" and/or in refusing to remand the case with the requirement that all said Royalty Owners be made real and indispensable parties.

IV.

(Omitted)

V.

The judgment of the trial court, and the Court of Civil Appeals, as well as this Court's refusal to grant Peti-

tioners' Application for Writ of Error has wrongfully deprived Petitioners of their property and their vested property rights without that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

(Remainder of this Motion is omitted)

Respectfully submitted,

RAMEY, BRELSFORD, FLOCK,
DEVEREUX & HUTCHINS,
MIKE A. HATCHELL,
TOM B. RAMEY, JR.,
FRANK L. MCCLENDON

By /s/ MIKE A. HATCHELL

Attorneys for Petitioners,

Citizens First National
Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75701.

CERTIFICATE OF SERVICE

This certifies that copies of this Appendix have been served upon counsel of record for Respondents by enclosing copies in sealed envelopes and depositing same in the United States Post Office at Tyler, Texas, with first-class postage prepaid and sent by Certified mail, and addressed to counsel of record at their post office addresses as follows:

Mr. Edward Kliewer, Jr.,
Kliewer and Hood,
2210 Mercantile Bank Bldg.,
Dallas, Texas 75201.

Mr. Willis D. Moore,
Moore and Holland,
P. O. Box 392,
Athens, Texas.

Dated this 15 day of August, 1969.

Jack W. Flock

Jack W. Flock, *one of the Attorneys for Petitioner.*

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 15 1969
JOHN F. DAVIS, CLER

No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, et al.,
Petitioners,

v

W. O. HILTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the 12th Supreme Judicial District of Texas at Tyler

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD KLIEWER, JR.,
2210 Mercantile Bank Building,
Dallas, Texas 75201.

Of Counsel:
KLIEWER AND HOOD,
2210 Mercantile Bank Building,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement	3
Argument	5
I. Petitioners Acquired No Rights Arising Under The Constitution, Treaties, Or Statutes Of, Or Commission Held Or Authority Exercised Under, The United States By Virtue Of The Stipulations Entered Into In The Federal District Court	5
II. No Substantial Federal Question Has Been Raised As Required By Federal Statute 28 USC Sect. 1257(3)	11
III. The Decisions Of The State Courts Complained Of By Petitioners Rest On Adequate Independent State Grounds	15
IV. State Courts Did Not Refuse To Give Full Faith And Credit To Order Or Judgment Of Federal Courts	16
Reasons Why Writ Should Be Denied	17
Conclusion	19
Appendix is filed herewith under separate cover	19

Page

Cases

Ayres v. Wiswall, 112 U.S. 187 7
Citizens National Bank v. Durr, 257 U.S. 99 13
Ferguson v. Georgia, 365 U.S. 570 13
Hale v. Akers, 132 U.S. 554 16
In re Lamkin, 355 U.S. 59 13
McMillen v. Ferrum Mining Co., 197 U.S. 343 13
New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 16
Radio Station WOW v. Johnson, 326 U.S. 120 13
Seeligson's Exrs. v. Texas Transp. Co., 70 Tex. 198, 7 S.W. 708 7
Tracy Loan & Trust Co. v. Mutual Life Ins. Co., 79 Utah 33, 7 P. 2d 279 7
Walls v. Chesapeake & O.R. Co., 256 U.S. 125 13
Zucht v. King, 260 U.S. 174, 176, 177 11

Authority

76 C.J.S. 1160 Removal of Causes §313 7

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 483

ATLANTIC RICHFIELD COMPANY, et al.,
Petitioners,

v.

W. O. HILTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the 12th Supreme Judicial District of Texas at Tyler

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents W. O. Hilton and wife, Malvrin Hilton, L. A. McCoy and wife, Ila Mae McCoy, and Willis D. Moore pray that the Petition for Writ of Certiorari filed herein by Atlantic Richfield Company, John W. Melton and wife, Virgie Melton, C. L. Hanna, Frances Walker McCain, Edson Petroleum Company, Southeastern Public Service Company, Domino Corporation, William G. Webb, Trustee for Empire Trust Company, Empire Trust Company, E. Fred Hersch-

bach, Fredrick J. Herschbach and Robert A. Herschbach be denied by this Court.

OPINIONS BELOW

(1) Opinion of the Court of Appeals for the Fifth Circuit in *W. O. Hilton, et al, Appellants v. The Atlantic Refining Company, et al, Appellees* is reported at 327 F 2d 217. The Opinion is printed in Petitioners' Appendix A, pps. 1-4.

(2) The Opinion of the Court of Civil Appeals for the 12th Supreme Judicial District of Texas in *The Atlantic Refining Company, et al, Appellants v. W. O. Hilton, et al, Appellees* is reported at 437 S.W. 2d 347. The Opinion is printed in Petitioners' Appendix B, pps. 5-21.

JURISDICTION

(1) Recitations of Paragraph 1 under "Jurisdiction" found at Page 2 of the Petition for Writ of Certiorari set forth the dates of the various proceedings in the State Courts below.

(2) This Court does not have jurisdiction of this cause because no substantial Federal question arising under the Constitution, treaties or laws of the United States is involved nor has any title, right, privilege or immunity been specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. Therefore Petitioners' attempt to invoke jurisdiction of this Court under Federal Statute 28 USC Section 1257 (3) must fail.

QUESTIONS PRESENTED

Petitioners assert that five Federal questions are presented, each arising out of the effect given certain stipulations entered into by counsel for the parties in the Federal District Court *after* that Court denied Respondents' Motion to Remand and prior to the holding of the Court of Appeals for the Fifth Circuit that said Federal District Court should have granted Respondents' Motion to Remand because the Federal District Court was without jurisdiction for want of diversity. For the reasons shown hereafter it is clear that no rights arising under the authority of the United States, the full faith and credit clause of the United States Constitution, the due process clause of the United States Constitution or Federal statutes and procedural rules, as claimed by Petitioners, exist, nor were any such claimed rights raised in the State Court below nor decided by the State Court below and this Court is, therefore, without jurisdiction.

STATEMENT

This suit was filed by Respondents W. O. Hilton and wife Malvrin Hilton and L. A. McCoy and wife Ila Mae McCoy (who are citizens of the State of Texas) in the District Court of Henderson County, Texas on November 22, 1961 against Atlantic Refining Company (now Atlantic Richfield Company) to remove the cloud on their title created by a pooling declaration filed by Atlantic Richfield Company which pooling declaration purported to pool and Oil and Gas Lease covering said Respondents' land located in Henderson County, Texas (Petitioners' Appendix E, Pages 26-28).

(1) Atlantic Richfield Company removed the suit to the U. S. District Court on the grounds of diversity of citizenship. Respondents filed a Motion to Remand the cause to the State Court on the ground that the suit involved interests owned by royalty owners in the pooled unit who were not presently parties to the suit whose joinder would destroy diversity and the jurisdiction of the Federal Court (Petitioners' Appendix G. Page 33-34).

(2) The Federal District Court denied Respondents' Motion to Remand to which denial Respondents excepted. Subsequent to the denial of Respondents' Motion to Remand certain Stipulations were entered into by the counsel for the respective parties which Stipulations were essentially a summary of the contents of various instruments, Texas Railroad Commission orders, and other documents which had been introduced in evidence and a recitation that the ultimate contested issue was the validity of the subject Oil and Gas Lease then owned by the Atlantic Richfield Company (Petitioners' Appendix I, Pages 44-45).

(3) The Federal District Court then proceeded to hear said case on its merits and held that the subject lease was valid and subsisting and that Atlantic Richfield Company recover title and possession of the subject Oil and Gas Leasehold estate (Petitioners' Appendix, Pages 64-66).

(4) Respondents perfected their appeal to the Court of Appeals for the Fifth Circuit and the Fifth Circuit held that certain necessary and indispensable parties were absent, whose joinder would destroy diversity of the Federal District

Court. The Fifth Circuit therefore reversed the judgment of the Federal Court below with directions to remand the subject case to the State Court.

(5) The case was then tried in the State Court on amended pleadings of both Respondents and Petitioners. All parties filed Motions for Summary Judgment and the State District Court held that Respondents should recover title and possession of the mineral fee estate in the subject land except as to certain royalty interests.

(6) The State Court of Civil Appeals affirmed the judgment of the State District Court. Petitioners' Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error, and Petitioners' Motion for Rehearing on such Application was overruled (Petitioners' Appendix C, Page 22).

(7) Petitioners filed in the State Court of Civil Appeals a Motion to Stay the Mandate pending petition for Writ of Certiorari to the Supreme Court of the United States which Motion was granted by the State Court of Civil Appeals.

ARGUMENT

I.

PETITIONERS ACQUIRED NO RIGHTS ARISING UNDER THE CONSTITUTION, TREATIES, OR STATUTES OF, OR COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES BY VIRTUE OF THE STIPULATIONS ENTERED INTO IN THE FEDERAL DISTRICT COURT.

Petitioners seek to invoke the jurisdiction of this court to protect rights under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States ("federal rights") claimed by Petitioners to have been acquired (A) under the stipulations contained in the pre-trial order entered by the Federal District Court, or (B) under the judgment of the Court of Appeals for the Fifth Circuit remanding the cause to the State Court because, Petitioners contend, the stipulations formed the basis of that judgment. Neither of Petitioners' contentions can be sustained.

A. Petitioners acquired no "federal rights" by virtue of the stipulations contained in the pre-trial order entered by the Federal District Court for two reasons:

(1) The pre-trial order *expressly* provided that "* * * heretofore on June 26, 1962, the Court heard Plaintiffs' Motion to Remand this cause to the District Court of Henderson County, Texas, and said Motion was in all things denied and overruled to which action of the Court the Plaintiff duly excepted, *and all stipulations herein contained are subject to said Plaintiffs exceptions.*"

As Respondents' approval of the pre-trial order was expressly subject to their Motion to Remand, such approval was withdrawn upon the sustaining of the Motion to Remand by the Fifth Circuit. It is therefore clear that the pre-trial order (and the stipulations contained therein) were thereafter without effect as to either Respondents or Petitioners.

(2) Secondly, Petitioners acquired no "federal rights" under the pre-trial order containing the stipulations, because

(as later held by the Fifth Circuit), the Federal District Court lacked jurisdiction to enter the pre-trial order.

After remand it was, of course, for the State Court to determine what should be done with, and the effect of, pleadings and papers filed and testimony taken during the pendency of the suit in Federal Court. *Ayres v. Wiswall*, 112 U.S. 187; see *Tracy Loan & Trust Co. v. Mutual Life Ins. Co.*, 79 Utah 33, 7 P. 2d 279; 76 C.J.S. 1160 Removal of Causes §313; *Seeligson's Exrs. v. Texas Transp. Co.*, 70 Tex. 198, 7 S.W. 708.

This rule is inherently sound, for if it were otherwise, any removal case remanded to State Court by a United States Court of Appeals could become a patchwork of inconsistent Federal and State decisions based on the holdings of the various judges and the differing procedural rules in the two jurisdictions. Manifestly a Plaintiff's right to try a cause of action in a State Court entirely under State procedure, where the cause is not properly removable, is just as valuable as the right of a Defendant to try a properly removable cause in Federal Court.

Petitioners' arguments about the pre-trial order were expressly considered — and rejected — by the Texas Court of Civil Appeals. In refusing Petitioner's Application for Writ of Error "no reversible error" (12 Tex. Sup. Ct. Journal 376) and denying Petitioners' Motion for Rehearing (12 Tex. Sup. Ct. Journal 448) the Supreme Court of Texas necessarily rejected Petitioners' arguments.

B. Petitioners could have acquired no "federal rights" by virtue of the judgment of the Court of Appeals for the Fifth Circuit remanding this cause to State Court, because such stipulations *did not form the basis* of such decision to remand and there was no holding of the Court of Appeals for the Fifth Circuit to that effect.

The basic contention of Petitioners (found at Page 16 of the Petition for Writ of Certiorari) is that the judgment of the Fifth Circuit gave them a "federal right" because that Court decided the question of remand

> "* * * *based upon what was stipulated by the parties* under approval of federal court that the lease was in production and pooled subject to sufficiency of lease description. *Holding by U. S. 5th Circuit Court that its decision was made because lease was in production and pooled was element in favor of and under which Respondents claim.* The state court allowed Respondents to repudiate the stipulations and refused to give effect to the stated basis of the judgment of the Federal Court." (Petition for Writ of Certiorari, Page 16). (Emphasis added)

The stipulations relied on by Petitioners as the basis for the Fifth Circuit holding, set forth in Item 3, Page 11 of the Petition for Writ of Certiorari, are as follows:

> (1) "* * * Atlantic had drilled a producing oil well within the pooled unit but off the lease, * * *"
>
> (2) "* * * had made the declaration of unit 'whereby a 160 acre unit was formed for the production of oil' * * *"
>
> (3) "* * * 'whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly

80 acres from the W. O. Hilton, et al lease making the total of 160 acres,' * * *"

(4) "* * * the remaining 2.713 acres 'has been pooled as a part of' a 160 acre oil unit on the South * * *"

(5) "* * * the contested issues related to the sufficiency of the land description in the lease."

Passing the question whether the Petitioners' theory that such stipulations created a "federal right" is valid, they cannot reach their desired result because the above five stipulations clearly were not the basis for the order of remand entered by the Fifth Circuit.

At no point, either expressly or by implication, does the opinion of the Fifth Circuit refer to the stipulations or to the pre-trial order (Petitioners' Appendix A, Pages, 1-4). However, that Court's opinion *does* state that:

"Evidence on appellants' motion to remand was heard and denied, * * *" (Petitioners' Appendix A, Page 2).

An examination of the evidence heard by the Federal District Court at the hearing on the Motion to Remand establishes beyond question that the pre-trial order (containing the stipulations set forth above and relied on by Petitioners) was not, in fact, the basis of the judgment of the Fifth Circuit, because all of the "facts" (which were really nothing more than a summary of the contents of various instruments, Texas Railroad Commission Orders, and the like) contained in the above stipulations were in evidence before the Federal District Court when the Motion to Remand was heard.

Each of the facts contained in the stipulations referred to above appear in the Record of the Hearing on Plaintiffs' Motion to Remand as follows:

(1) "* * * Atlantic had drilled a producing oil well within the pooled unit but off the lease, * * *" (Respondents' Appendix, Page 11);

(2) "* * * had made the declaration of unit 'whereby a 160 acre unit was formed for the production of oil' * * *" (Respondents' Appendix, Page 4);

(3) "* * * 'whereby there was pooled and combined exactly 80 acres from the J. W. Melton lease and exactly 80 acres from the W. O. Hilton, et al lease making the total of 160 acres,' * * *" (Respondents' Appendix, pages 4, 5, 6, and 7);

(4) "* * * the remaining 2.173 acres 'has been pooled as a part of' a 160 acre oil unit on the South * * *" (Respondents' Appendix, Page 4);

(5) "* * * the contested issues related to the sufficiency of the land description in the lease". (Respondents' Appendix, Page 40).

As the approval by Respondents of the pre-trial order (containing the stipulations) added nothing whatsoever to the record previously made on the hearing on the Motion to Remand, neither such pre-trial order nor the stipulations therein could have formed the "basis" for the order of remand entered by the Court of Appeals for the Fifth Circuit.

The sole question to be decided by the Court of Appeals for the Fifth Circuit was whether or not the Federal District Court should have remanded the case to the State Court. The sole holding of the Court of Appeals for the Fifth Circuit was that the District Court did not have jurisdiction and the cause must be remanded to the State

Court. All references by Petitioners to statements in that opinion are references to dicta and obiter dicta and cannot form the basis of any character of "federal right" as asserted by Petitioners.

II.

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED AS REQUIRED BY FEDERAL STATUTE 28 USC SECT. 1257(3)

Even if the facts asserted by Petitioners were construed to create a Federal question (and Respondents submit that it is clear that no such Federal question exists) Petitioners have failed to raise a substantial Federal question in the manner required to bring the case under the jurisdiction of this Court. *Zucht v. King*, 260 U.S. 174, 176, 177.

Petitioners assert that a Federal question was seasonably raised:

(1) in the State District Court by various pleadings referred to on Pages 14 and 15 of the Petition for Writ of Certiorari;

(2) in the State Court of Civil Appeals by Points of Error Nos. 1, 2, 3 and 7 in Petitioners' Brief (Petitioners' Appendix X, Pages 106-108 and Y, Pages 109-110);

(3) in the State Court of Civil Appeals by Points of Error Nos. 1-15 and No. 40 in their Motions for Rehearing (Petitioners' Appendix Z, Pages 111-118, and Z-1, Pages 119-120;

(4) in the Supreme Court of Texas by Points of Error Nos. 1, 2, 3, 4 and 13 in their Application for Writ of Error (Petitioners' Appendix C, Pages 22-23);

(5) in the Supreme Court of Texas by Assignments of Error Nos. I, II and V in their Motion for Rehearing (Petitioners' Appendix Z-3, Pages 125-127); and

(6) by the recitations in the opinion of the State Court of Civil Appeals, 437 S.W. 2d 347 at Page 351, as reprinted on Pages 9-11 of Petitioners' Appendix B.

As to Items (1) through (4) above Petitioners' contentions are unfounded and without basis for two reasons:

(1) The State District Court pleadings referred to merely contain exceptions to the pleadings of Plaintiffs (Respondents here) and assert various grounds of "estoppel" of Plaintiffs (Respondents here) which clearly have no reference to "Federal questions".

(2) A simple reading of the Points of Error addressed to the State Court of Civil Appeals, referred to in Item (1) through (4) above, make it abundantly clear that they do not raise a Federal question. Those Points of Error are generally based on a claimed right of estoppel of some nature. Nowhere do Petitioners show, as of course they cannot, that estoppel is a Federal question under the purview of the due process clause of the United State Constitution.

The failure of Petitioners to raise any "Federal question" in the State Courts defeats jurisdiction of the Supreme

Court of the United States. In re *Lamkin*, 355 U.S. 59; *Ferguson v. Georgia*, 365 U.S. 570.

Assignments of Error Nos. I and III in the State Supreme Court, referred to in Item (5) above, likewise fail to raise a Federal question. In assignment of Error V Petitioners do, for the first time, properly frame a Federal question but such raising of the Federal question comes too late under the clear authority established by the United States Supreme Court that where a Federal question is attempted to be raised for the first time by a Petition or Motion for Rehearing in the highest court of a State, and the State Court, in denying the Petition or Motion for Rehearing, makes no reference to the Federal question, there is no basis for a Writ of Certiorari from the Supreme Court of the United States. *McMillen v. Ferrum Mining Co.*, 197 U.S. 343; *Wall v. Chesapeake & O.R. Co.*, 256 U.S. 125; *Citizens National Bank v. Durr*, 257 U.S. 99; *Radio Station WOW v. Johnson*, 326 U.S. 120.

The only remaining "basis" asserted by Petitioners in seeking to establish that a Federal question has been raised is their contention that such question was raised by the following language from the opinion of the Court of Civil Appeals of Texas (Petitioners' Appendix B, Pages 9-11):

> "* * * (1) It seems to be a well established rule of law that stipulations of counsel with respect to the construction and legal effect of unambiguous contracts are not binding on either the court or the parties. [cites authorities]
>
> (2) There was no claim that the lease was ambiguous. Under the above cited authorities, since the stipulated

> issues before the Federal Court involved only a question of law, appellees were not barred or foreclosed from thereafter amending their pleadings and proving that, as a matter of law, the Atlantic-Hilton Lease had terminated because of improper exercise of the pooling provision under the doctrine of Jones v. Killingsworth, supra. These points are overruled."

The language quoted above clearly demonstrates that the Court of Civil Appeals of Texas did not have before it, and did not decide any "Federal question" but rather, simply interpreted the legal effect to be given to stipulations of counsel as to certain matters of law. The Court of Civil Appeals referred only to the common law doctrine concerning the binding effect of stipulations entered into by counsel and general provisions of Texas land law. Respondents submit that this does not constitute the raising of a substantial Federal question.

Respondents assert that it is clear that the State Court pleadings, Points of Error and Assignments of Error do not satisfy the requirement of Federal Statute 28 USC Section 1257(3) that any title, right, privilege or immunity under the Constitution, treaties or statute of, or commission held or authority exercised under, the United States must be "* * * specially set up or claimed * * *" and that therefore Petitioners have never raised a substantial Federal question which could bring this case under the jurisdiction of this Court.

It is equally certain that such pleadings, Points of Error and Assignments of Error do not contain the slightest inference that would suggest to the State Court that Petitioners

were relying on any Federal Statute or Federal Constituional provision or authority exercised under the United States. Petitioners (with the one exception of their Assignment of Error V included in their Motion for Rehearing in the Supreme Court of Texas) have done nothing more than to assert time after time that the effect of the stipulations was to contractually bind or estop Respondents from amending their pleadings or contending that the subject lease was invalidly pooled. Clearly this is not sufficient to constitute the raising of a substantial Federal question either directly, by inference or implication, or by necessary intendment and since no substantial Federal question was raised this Court will not accept jurisdiction.

III.

THE DECISIONS OF THE STATE COURTS COMPLAINED OF BY PETITIONERS REST ON ADEQUATE INDEPENDENT STATE GROUNDS.

Respondents have heretofore quoted the holding of the Court of Civil Appeals of Texas asserted by Petitioners to be the basis of the depreviation of "federal rights" acquired by them. As discussed above the Court of Civil Appeals of Texas did not have before it, and did not decide, a Federal question. That court merely held that the stipulations relied on by Petitioners were as to matters of law and therefore, not binding on either the court or the parties. It clearly appears, therefore, that the aspect of the case relied upon by Petitioners was disposed of upon a rule of common law (general jurisprudence) and it is well established that where the decision of the State Court is made upon rules of common

law (general jurisprudence) or upon grounds sufficiently broad to sustain the judgment without consideration of the Federal question, the United State Supreme Court will not take jurisdiction. *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79.

There is no showing, or suggestions made, that the decision of the State Court would have been different in any respect had the stipulations been entered into in the State Court proceedings rather than in a Federal Court (which Court was later determined to be without jurisdiction). Any issue as to the effect of the stipulations was disposed of by the Court of Civil Appeals by its express holding that under the circumstances cited, such stipulations were, as a rule of common law (general jurisprudence), not binding on the court or the parties, and it is clear that where such a non-Federal ground controls the determination of the question before the State Court, the United States Supreme Court will not review the State Court decision. *Hale v. Akers*, 132 U.S. 554.

IV.

STATE COURTS DID NOT REFUSE TO GIVE FULL FAITH AND CREDIT TO ORDER OR JUDGMENT OF FEDERAL COURTS

Petitioners' contention that the judgment of the Texas Court of Civil Appeals refused to give full faith and credit to the approval of the stipulations by the Federal District Court and to the judgment of the Fifth Circuit (Petition for Writ of Certiorari, Page 7) is without merit. As was shown above,

the pre-trial stipulation in the Federal District Court was expressly subject to Respondents' exception to the overruling of the Motion to Remand and when the judgment was reversed by the Fifth Circuit for lack of jurisdiction, the stipulations had no further force and effect.

The judgment of the Fifth Circuit (327 F. 2d 217) dealt exclusively with the existence of resident indispensable parties and held that the joinder of these indispensable parties would destroy the necessary diversity for purpose of jurisdiction. It ordered the remand of the case to the State Court, citing Judicial Code §1447(c) which directs such an action "if * * * it appears that the case was removed improvidently and [the District Court] was without jurisdiction * * *". Therefore there can be no possible question of refusal to give full faith and credit to this judgment.

REASONS WHY WRIT SHOULD BE DENIED

1. Petitioners' claim that a substantial Federal question is presented to this Court is based solely on the effect of certain stipulations entered into under a pre-trial order in the Federal District Court which Court was later determined to have been without jurisdiction. Such stipulations were not only expressly subject to Respondents' Motion to Remand and therefore of no further force and effect when the Fifth Circuit held that the Motion to Remand should have been granted, but furthermore, as a matter of law, it was for the State Court to determine the effect to be given the stipulations

when the cause was remanded to the State Court. Therefore no Federal question exists.

2. Petitioners did not properly frame or raise a Federal question in the State Court proceedings until Petitioners' Motion for Rehearing filed in the highest Court of the State and under clear authority this Court will not accept jurisdiction of a case where a Federal question is raised for the first time at that stage of the proceedings. In any event the Federal question sought to be framed and raised in said Motion for Rehearing was not a substantial Federal question even if said question had been timely raised.

3. No substantial Federal question was discussed or decided by any of the State Courts below.

4. The sole question before the Court of Appeals for the Fifth Circuit was the question of diversity of citizenship to support Federal Court jurisdiction and the sole holding of that Court was that such diversity did not exist. Petitioners' assertions that the State Courts denied full faith and credit to that judgment on the ground that the Court of Appeals for the Fifth Circuit "held" that the subject lease had been validly pooled is absolutely without basis.

5. The judgments of the State Courts below were based on adequate and substantial independent State grounds involving principles of common law (general jurisprudence) and the application of general principles of the Texas law governing title suits concerning real property situated in the State of Texas and where a State Court judgment is based on such substantial non-Federal grounds this Court will not accept

jurisdiction to review a Federal question even if properly framed and raised.

7. The Petition for Writ of Certiorari does not comply with any criteria of Rule 19 of the United States Supreme Court rules concerning the considerations governing review by this Court of State Court decisions on certiorari. The State Court has not decided a Federal question of substance not theretofore determined by this Court nor has it decided such a question in a way probably not in accord with applicable decisions of this Court.

APPENDIX

Appendix is filed under separate cover herewith.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Edward Kliewer, Jr.

Edward Kliewer, Jr.
Attorney for Respondents

Of Counsel:

KLIEWER AND HOOD,
2210 Mercantile Bank Building,
Dallas, Texas 75201.

CERTIFICATE OF SERVICE

This certifies that copies of this Brief have been served upon counsel of record for Petitioners by enclosing copies in sealed envelopes and depositing same in the United States Post Office at Dallas, Texas, with first-class postage prepaid and sent by Certified mail, and addressed to counsel of record at their post office addresses as follows:

Jack W. Flock,
Tom B. Ramey, Jr.,
Frank L. McClendon
Citizens First National Bank Building
P. O. Box 629
Tyler, Texas 75701

Dated this 30th day of September, 1969.

Edward Kliewer, Jr.

Edward Kliewer, Jr.
Attorney for Respondents

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 15 1969
JOHN F. DAVIS, CLERK

No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, *et al.*,
Petitioners,

v.

W. O. HILTON, *et al.*,
Respondents.

APPENDIX TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI

EDWARD KLIEWER, JR.,
2210 Mercantile Bank Building,
Dallas, Texas 75201.

Of Counsel:
KLIEWER AND HOOD,
2210 Mercantile Bank Building,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

No. 483

In the

Supreme Court of the United States

OCTOBER TERM, 1969

ATLANTIC RICHFIELD COMPANY, *et al.*,
Petitioners,

v.

W. O. HILTON, *et al.*,
Respondents.

APPENDIX TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI

APPENDIX

Proceedings On Hearing On Motion To Remand In U. S. District Court, And Designated By W. O. Hilton et al As Part Of The Record For Appeal To U. S. 5th Circuit Court.

(U. S. 5th Circuit Court Record, Volume 1, Page 106)

TYLER, TEXAS

JUNE 26, 1962

REPORTER'S NOTE: The Court opened at 9:30 o'clock, a.m., June 26, 1962.

THE COURT: Civil Action No. 2962: W. O. Hilton and others versus Atlantic Refining Company, a corporation.

Is the Plaintiff ready to proceed on their Motion to Remand?

MR. MOORE: Yes. Yes; the Plaintiff is ready, Your Honor.

THE COURT: Is the Defendant ready?

MR. RAMEY, SR.: Yes, Your Honor.

THE COURT: All right.

* * * * *

MR. MOORE: Would you mark that, please?

(DECLARATION OF UNIT — filed by Atlantic Refining Company in Deed Records of Henderson County, Texas, as recorded in Book 498, Page 389 — re Melton Oil Unit, was duly marked as:

PLAINTIFFS' EXHIBIT NO. 1)

MR. MOORE: Your Honor, Plaintiff first offers in evidence —

THE COURT: (interrupting) Exhibit it to opposing counsel.

REPORTER'S NOTE: An instrument was handed to Counsel for the Defendant.

MR. MOORE: (continuing) — the Declaration of Unit heretofore filed by the Atlantic Refining Company in the Deed Records of Henderson County, Texas — recorded in Book 498, Page 389 — styled: "The Melton Unit".

(pause)

Your Honor, this offer into evidence is made for the limited purpose of showing the claims asserted to Atlantic and not for proof of admitting the validity of anything in it.

REPORTER'S NOTE: An instrument was handed to the Court.

(pause)

(DIVISION ORDER: of Atlantic Refining Company — addressed to The Atlantic Refining Company, P. O. Box 2819, Dallas, Texas, re ATLANTIC — Melton Oil Unit #43340-51711 Lease, in the Fairway James Lime Field; under cover letter from The Atlantic Refining Company, dated September 22, 1961, and addressed to "ALL INTEREST OWNERS", was duly marked as:

PLAINTIFFS' EXHIBIT NO. 2)

REPORTER'S NOTE: An instrument was handed to Counsel for the Defendant.

(pause)

MR. MOORE: Your Honor, Plaintiff —

THE COURT: (interrupting) Pass it to the Clerk.

MR. MOORE: We next offer into evidence a Unit Division Order, prepared by the Atlantic Refining Company on the Melton Unit, for the purpose of showing the claims asserted and admitted by the Defendant therein; but for that limited purpose and not for the purpose of proving the truth of any of the claims therein shown.

REPORTER'S NOTE: An instrument was handed to the Court.

(DESIGNATION OF UNIT — executed on the 22nd day of January, 1962, effective as of October 1, 1961, by Cities Service Petroleum Company and The Atlantic Refining Company, was duly marked as:

PLAINTIFFS' EXHIBIT NO. 3)

REPORTER'S NOTE: An instrument was handed to Counsel for the Defendant.

(pause)

* * * * *

THE COURT: Does it cover the same land covered by the —

MR. RAMEY, SR.: (interrupting) Well, it covers a — a fraction of the land which is covered by the Atlantic Lease which is in dispute in this case; about two or three acres off of the south end of the — of it — of the tract which is under lease to the Atlantic. And this is a unitization agreement which is — which incorporates that fractional amount of acreage with some other adjacent acreage which is owned by the Cities Service Oil Company.

(DIVISION ORDER — of Atlantic Refining Company — addressed to The Atlantic Refining Company, P. O. Box 2819, Dallas, Texas, re CITIES SERVICE PETROLEUM COMPANY—Emerson Unit #43340-33751 Lease, in the Fairway (James Lime) Field; under cover letter from The Atlantic

Refining Company, dated June 1, 1962, and addressed to "ALL INTEREST OWNERS", was duly marked as:

PLAINTIFFS' EXHIBIT NO. 4)

REPORTER'S NOTE: An instrument was handed to Counsel for the Defendant.

(pause)

* * * * *

MR. MOORE: All right, sir.

Your Honor, we would next like to offer Defendant's Original Answer in evidence for the purpose of showing that the land described in our Petition is the same land described in the Declaration of Unit which they admit; if that's —

THE COURT: (interrupting) Well, you don't have to introduce it in evidence.

MR. MOORE: All right, sir.

THE COURT: That's an admission. You don't have to introduce that in evidence.

MR. MOORE: All right, sir; that's all we have, then, Your Honor.

THE COURT: All right; does the Defendant have anything?

MR. RAMEY, SR.: Yes, Your Honor.

I think it would be appropriate if Your Honor would — were advised what is the genesis of this lawsuit; and, therefore, I would like to call Mr. Daugherty, who is a surveyor, to just identify a plat which was made pursuant to his survey on the ground and which reflects the land in this unit which is under attack.

THE COURT: All right.

* * * * *

H. J. DAUGHERTY,

having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. RAMEY, SR.:

"Q. Mr. Daugherty, what are your initials?

"A. Pardon?

"Q. What is your name?

"A. H. J. Daugherty.

"Q. Where do you live, Mr. Daugherty?

"A. My home is in Marshall, Texas.

"Q. By whom are you employed?

"A. Atlantic Refining Company.

"Q. In what capacity?

"A. As a surveyor.

* * * * *

"Q. Mr. Daugherty, this suit concerns the — what is known as the Melton Unit in the Alfred Benge Survey in Henderson County, Texas — composed of the Melton eighty — so-called eighty-acre tract and the Hilton-McCoy eighty-acre tract.

Have you had occasion to survey those tracts?

"A. Yes, sir.

"Q. When did you survey them?

"A. In February, 1961 — last year.

* * * * *

BY MR. RAMEY, SR.:

"Q. Mr. Daugherty, there is exhibited before you a plat, which has been designated by the Clerk as Defendant's Exhibit 1. I will ask you whether or not that plat correctly reflects the — your survey of the Melton Unit?

"A. It does.

"Q. Did you go on the ground — actually on the ground to survey that land which is exhibited by the map?

"A. I did.

* * * * *

"Q. Which tract is the Melton tract?

"A. The westerly tract is the Melton tract.

"Q. Was it supposed to — I mean, did it call for in the field notes to contain eighty acres?

"A. Yes, sir; it does.

"Q. Was — Did you survey around the so-called Hilton tract — the Hilton and McCoy tract (indicating)?

"A. I did.

"Q. Was — Did you find from the field notes that it called for eighty acres?

"A. Yes, sir; I did.

* * * * *

MR. RAMEY, SR.: We offer the deed from W. A. Hogue and wife to W. O. Hilton and L. A. McCoy, dated November the 5th, 1942; recorded in Volume two five three, page two three four — deed records of Henderson County, Texas — which we have a copy of.

This is on page one twelve of the abstract of title prepared by Richardson-Watkins Abstract Company — No. 14,990.

* * * * *

(DEED — from W. A. Hogue and wife to W. O. Hilton and L. A. McCoy, dated 5 November, 1942, filed November 18, 1942, and recorded in Volume 253, page 234, Deed Records, Henderson County, Texas, was duly marked as: DEFENDANT'S EXHIBIT NO. 2)

* * * * *

MR. RAMEY, SR.: We next offer in evidence the deed — I mean the oil, gas and mineral lease from W. O. Hilton, and wife Malvirin Hilton, and L. A. McCoy, and wife Illa Mae McCoy, to B. L. Garrett, dated the 5th day of August, 1951 — which is recorded in Volume 373, Page 255.

(OIL, GAS AND MINERAL LEASE — from W. O. Hilton and wife and L. A. McCoy and wife to B. L. Garrett, dated August 5, 1951, filed August 25, 1951, and recorded in Volume 373, Page 255, Deed Records of Henderson County, Texas, was duly marked as: DEFENDANT'S EXHIBIT NO. 8)

* * * *

The Court: I assume it provides the lessee can cut up a unit by filing a Declaration of Unitization.

MR. RAMEY, SR: Yes, it does, Your Honor. And it also provides that the units pooled for oil hereunder — well, it reads: (reading)

"Units pooled for oil hereunder shall not substantially exceed forty acres * * *

provided that should Governmental authority having jurisdiction prescribed or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by Govermental regulations."

And we are prepared to show that the Railroad Commission of Texas prescribed eighty acres in this field as a minimum and one hundred and sixty acres as a maximum in size as units for oil.

We next offer into evidence assignments of this particular lease, which was executed by the Plaintiffs to B. L. Garrett — from B. L. Garrett to E. C. Casey — which is shown on Page 153 of the abstract.

(ASSIGNMENT — from B. L. Garrett to E. C. Casey, dated August 6, 1951, filed on Aug. 25, 1951, and recorded in Volume 320, Page 481 of Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 9)

MR. RAMEY, SR: And also an assignment from E. C. Casey to Atlantic Refining Company of the same lease, which is shown on Page 153 of the abstract.

(ASSIGNMENT — from E. C. Casey to Atlantic Refining Company, dated August 7, 1951, and recorded in Volume 373, Page 260 of Deed Records of Henderson County, Texas — filed on August 25, 1951, was duly marked as:

DEFENDANT'S EXHIBIT NO. 10)

MR. RAMEY, SR: Both of those assignments are dated — one of them is — the first one is dated the 6th day of August of '51 and the second one is dated the 7th day of August of '51.

* * * * *

We next offer in evidence, if the Court please, the Declaration of Unitization.

THE COURT: That's already been offered; hasn't it?

MR. RAMEY, SR: Has it?

MR. MOORE: Yes, we offered it.

THE COURT: The Plaintiff offered the Declaration of Unitization as its Exhibit No. 1.

MR. RAMEY, SR: Well, fine.

THE COURT: For a limited purpose.

Now, if you want to offer it for additional —

MR. RAMEY, SR: (interruption) We offer it generally.

THE COURT: Well, that will be Plaintiff's Exhibit No. 1, then. There is no use putting them back in here then.

All right; are you through with this witness?

MR. RAMEY, SR: I think so — at this time; as far as I'm concerned.

MR. MOORE: Your Honor, I want to ask him one or two questions.

THE COURT: Well, we will take about a ten-minute recess.

MR. MOORE: All right; fine.

REPORTER'S NOTE: The Court then, at 11:20 o'clock, a.m., June 26, 1962, recessed until 11:30 o'clock, a.m., the same date, at which time it reconvened.

DIRECT EXAMINATION

(continued)

BY MR. RAMEY, SR:

"Q. Mr. Daugherty, do you know whether or not an oil well has been drilled and completed on either one of these eighty-acre tracts that you have been testifying about?

"A. Yes, sir; I do.

"Q. Who drilled it?

"A. Pardon?

"Q. I mean, at whose instance was the well drilled?

"A. The Atlantic Refining Company.

"Q. Where is that well located?

"A. It's located in the northeast part of the west eighty acres on Mr. Melton's land.

"Q. Is this spot (indicating) here on the map, which we will indicate at "K" —

REPORTER'S NOTE: Counsel for the Defendant marked on instrument.

"Q. (continuing) — dot "K" there — is that the location of this well?

"A. Yes, sir; that's it.

"Q. Is it a producing well?

"A. It is.

"Q. Do you know about when the well was drilled — commenced?

"A. Some time this past year. I imagine during the summer of 1961. Somewhere in that neighborhood.

"Q. Is that well located in an area which is known as an oil producing area?

"A. I didn't quite get your question.

"Q. Is that well located in an area which is known as an oil producing area?

"A. Yes, sir; it is.

"Q. By what name is that area known and designated?

"A. That's ordinarily known as the "Fairway Field".

"Q. Do you know whether or not there are other producing wells — oil wells in that vicinity?

"A. Yes, sir; I do.

"Q. Do you know whether or not there are wells — producing oil wells to the north?

"A. There are some producing oil wells surrounding the tract.

"Q. Surrounding the tract.

All — In every direction?

"A. North, south, east and west — to the best of my knowledge; I'm sure it is that way.

"Q. Have you been on the ground and seen those wells?

"A. Well, some of them were drilled subsequent to my having been on the ground for this survey; but it's — all that area is drilled-up.

MR. RAMEY, SR: We next offer in evidence a — a regulation promulgated by the Railroad Commission of Texas, effective July 1, 1961, pertaining to the Fairway Field, if the Court please; referring to the proration units provided for in the Fairway Field rules for an eighty-acre proration plus and eigthy-acre tolerance for each well.

THE COURT: In other words, it permits units up to a hundred and sixty acres.

MR. RAMEY, SR: Yes.

(LETTER — From Railroad Commission of Texas, Oil and Gas Division, dated June 12, 1961, was duly marked as:

DEFENDANT'S EXHIBIT NO. 13)

MR. RAMEY, SR: And this also is a certified copy of the order of the Railroad Commission upon which that communication is predicated.

(SPECIAL ORDER — of Railroad Commission of Texas, Oil and Gas Division — adopting temporary rules and regulations for the Fairway (James Lime) Field, Anderson & Henderson Counties, Texas, dated March 14, 1961, being Oil and Gas Docket No. 120, #6-45,322, was duly marked as:

DEFENDANT'S EXHIBIT NO. 14)

MR. RAMEY, SR: This is — The document to which I have last referred — Exhibit 14 — which is headed "Railroad Commission of Texas, Oil and Gas Division — "Oil and Gas Docket No. * * *" so-and-so "Re: Conservation and prevention of waste of crude petroleum and natural gas in the Fairway (James Lime) Field, Anderson and Henderson Counties, Texas."

And we call your attention to this provision therein contained — that: (reading)

"The acreage assigned to the individual oil well * * *"

Now I'm reading Rule 2: (reading continued)

"* * * for the purpose of allocating allowable oil production thereto shall be known as a proration unit. No proration unit shall consist of more than eighty acres except as hereinafter provided * * *"

and so forth.

And then it says: (reading)

> "Provided, however, that operators may elect to assign tolerance of not more than eighty acres of additional unassigned lease acreage to a well on an eighty-acre unit and shall in such event receive allowable credit for not more than one hundred and sixty acres."

Now, Your Honor, inasmuch as Plaintiffs have designated certain individuals that they claim should be made parties to this action as indispensable parties, we would like to at this time offer the royalty deeds under which those individuals hold — all of which are non-participating royalty deeds — which we contend conveys no right, title and interest into the oil and gas in and under the land at all, but is merely an assignment of personal property as, if and when it is produced — save (phonetic) and sold from the land.

THE COURT: Well, let's finish with this witness first. They said they wanted to cross-examine him.

MR. RAMEY, SR: Well —

THE COURT: They have the right to cross-examine the witness while —

MR. RAMEY, SR.: (interrupting) Yes, sir.

THE COURT: All right; go ahead.

MR. RAMEY, SR: I'm sorry, Your Honor, I was just trying to get the data before the Court while he was on the stand.

CROSS-EXAMINATION

BY MR. MOORE:

* * * * *

> "Q. Now, your point "A" here (indicating) calls to begin at the northwest corner of the John P. Miller three hundred acre survey.
>
> "A. That's right.

"Q. Where is the John P. Miller three hundred acre survey?

"A. The John P. Miller three hundred acre survey is very indefinitely described.

"Q. Have you read the deed of the John P. Miller three hundred acre survey?

"A. Some time back.

"Q. Doesn't it in truth and in fact lie in the northeast corner of the Alfred Benge League?

A. I didn't understand you.

"Q. Doesn't the John P. Miller three hundred acre survey in fact lie in the northeast corner of the Alfred Benge League?

"A. No; not that I know of. I think the description is rather indefinite — as I remember it. You might read it to me — or let me see.

(DEED — from J. N. Dean to John Miller, January 29, 1859, filed for record on January 17, 1860, Henderson County, Texas, was duly marked as:

PLAINTIFF'S EXHIBIT NO. 5)

REPORTER'S NOTE: An instrument was handed to Counsel for the Defendant.

(pause)

MR. RAMEY, SR: I'm not sure, Your Honor, from this description that it applies to any of the land in controversy. It doesn't identify any of the land; it doesn't even refer to a specific number of acres; and it's just a quick-claim deed.

THE COURT: What is the instrument? Pass it up, please.

REPORTER'S NOTE: An instrument was handed to the Court.

(pause)

THE COURT: What is the materiality of this, Mr. Moore?

MR. MOORE: Sir?

THE COURT: What is the materiality of this?

MR. MOORE: The materiality of it is, Your Honor, that all of their deeds refer back to a deed calling for the — to begin at the northwest corner of the John P. Miller three hundred acre survey. And that is the John P. Miller three hundred acre survey — and it lies two or three miles east of the land in controversy.

That is the defect in their lawsuit.

THE COURT: Overrule your objection.

* * * * *

MR. RAMEY, SR.: That's all for this witness.

THE COURT: Do you have any further questions of this witness, Mr. Moore?

MR. MOORE: No, sir.

THE COURT: All right; you may step down.

THE WITNESS: Thank you.

MR. RAMEY, SR.: We now offer some royalty deeds, all of which are — we submit, are non-participating royalty deeds to — in favor of parties who Plaintiffs have designated in their Motion to Remand are indispensable parties to this litigation.

(ROYALTY DEED — from W. O. Hilton and wife, Malvrin Hilton and L. A. McCoy and wife, Ila Moe McCoy, to H. P. Riley, dated April 1, 1961, filed for record on April 5, 1961, Henderson County, Texas — recorded in Volume 494, Page 259 of Deed Records, was duly marked as:

DEFENDANT'S EXHIBIT NO. 21)

(ROYALTY DEED — from W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to H. P. Riley, dated April, 1961, filed on April 27, 1961, and recorded in Volume 495, Page 190, Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 22)

(ROYALTY DEED — from W. O. Hilton and wife, Malvrin Hilton, to H. P. Riley, dated May 6, 1961, filed on May 8, 1961, and recorded in Volume 495, Page 417, Deed Records in Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 23)

MR. RAMEY, SR.: The first is a —

(pause)

— is an instrument executed by W. O. Hilton and wife and L. A. McCoy and wife in favor of H. P. Riley, which purports to convey and assign: (reading)

> "* * * an undivided five acre interest in and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline, and royalty in other minerals in and under, and that may be produced * * *"

from the land in controversy.

(pause)

Which is described as: (reading)

"BEGINNING at the Northeast corner of an eighty acre tract * * * bought by J. M. Curry from Frank Guiher * * *"

And this is Defendant's Exhibit 21.

* * * * *

MR. RAMEY, SR.: Next we introduce Defendant's Exhibit 22, which is signed by Hilton and wife, and H. P. Riley — W. O. Hilton and wife and H. P. Riley — which purports to convey: (reading)

"* * * an undivided five acre interest in and to * * *",

in the — in the royalty — and contains a recitation that: (reading)

"This deed is a correction deed and it is in lieu of and substitution of that certain royalty deed from W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy * * * to H. P. Riley, as Grantee, dated April 1, 1961, and recorded in Volume 494, page 259 * * *"

which is the instrument — Defendant's Exhibit 21 — (reading continued)

"* * * and the Grantee joins in the execution hereof to evidence his acceptance of this deed in correction of and in lieu of and substitution of said above mentioned Royalty Deed."

* * * * *

(ROYALTY DEED—from W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to Elise M. Young, dated June 19, 1961, filed for record on June 21, 1961, and recorded in Volume 497, Page 558, Deed Records, Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 24)

(ROYALTY DEED—from W. O. Hilton and wife, Malvrin Hilton, and L. A. McCoy and wife, Ila Mae McCoy, to James A. Latham, dated September 7, 1961, and filed for record on September 19, 1961, and recorded in Volume 503, page 157, of the Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 25)

MR. RAMEY, SR.: And we also offer at this point — (pause) — the royalty deeds executed and acknowledged by W. O. Hilton and wife and Ila Mae — I mean — L. A. McCoy and wife, dated June 19, 1961. That is Defendant's Exhibit 19 — I mean — 24 — and Defendant's Exhibit 25, executed the 7th day of May, 1961 — executed by both W. O. Hilton and wife and L. A. McCoy and wife — and executed — Exhibit "D-24" being executed in favor of Elise M. Young, which describes the land as: (reading)

"BEGINNING at the N. W. corner * * *"

both of which deeds describe the land as: (reading)

"BEGINNING at the N. W. corner of an eighty acre tract * * * heretofore bought by J. M. Curry from Frank Guiher * * *"

And it — they also contain the provisions that: (reading)

"Said lands or portions thereof, being now under oil and gas lease executed in favor of any valid leaseholder of record * * *"

And they — these instruments are both on the same non-participating form.

MR. MOORE: May Plaintiffs have the same objection, Your Honor, to those two?

THE COURT: Yes, you may. Overrule your objection.

MR. MOORE: Thank you. Note our exception, if the Court please.

(pause)

MR. RAMEY, SR.: We next offer this royalty deed inasmuch as the Plaintiff's motion named specific persons.

(ROYALTY DEED—from B. L. Garrett, and wife, Emma Garrett, to Fred M. Garrett, dated January 5, 1961, filed of record on March 21, 1961, and recorded in Volume 493, Page 572 of the Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 26)

MR. RAMEY, SR.: Royalty deed from B. L. Garrett and wife to Fred M. Garrett, dated January 5, 1961, recorded in Volume 493, page 572, shown on Page 6 of the Richardson and Watkins Abstract Company — abstract number 15126.

We offer this instrument for the purpose of showing what type of instrument it is and for the purpose of showing that it is a non-participating royalty instrument, just as the instruments that we have heretofore introduced are, and that they contain identical provisions as far as the conveyance of purely a royalty interest is concerned.

REPORTER'S NOTE: An instrument was handed to Counsel for the Plaintiffs.

(pause)

MR. MOORE: No objection for the purposes offered for.

THE COURT: All right.

MR. RAMEY, SR.: And we also offer that for general purposes.

* * * * *

(ROYALTY DEED — from Frances Walker McCain to C. S. McCain, Jr. and wife, Cornelia D. McCain, dated May 4, 1961, recorded in Volume 495, Page 527, Deed Records of Henderson County, Texas, filed for record on May 12, 1961, was duly marked as:

DEFENDANT'S EXHIBIT NO. 27)

MR. RAMEY, SR.: We also offer a royalty deed dated May 4, 1961, from Frances Walker McCain to C. S. McCain, Junior — recorded in Volume 495, page 527, Deed Records of Henderson County, Texas—which appears on page 88 of the aforesaid abstract. And it is written on the same form of royalty deed that the other.

(ROYALTY DEED — from H. P. Riley to Edson Petroleum Company, dated April 27, 1961, recorded in Volume 495, page 317, Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 28)

MR. RAMEY, SR.: And we also offer a — a royalty deed from H. P. Riley dated April 27, 1961 — recorded in volume 495, page 317, Deed Records, Henderson County, Texas, in which Edson Petroleum Company is the Grantee.

And it likewise is executed and drafted upon the same form of royalty deed that has been called to the attention of the Court.

CLERK OF THE COURT: What page is that one, Mr. Ramey?

MR. RAMEY, SR.: That is on page 83 of the same abstract.

* * * * *

THE COURT: (interrupting) Counsel has said that he will stipulate with you that these are what you call non-participating royalty deeds and all these people own non-participating royalty.

MR. MOORE: Yes, sir.

THE COURT: Except, of course, the owners of the — I mean — the lessor.

MR. MOORE: Yes, sir.

MR. RAMEY, SR.: Well —

MR. McCLENDON: (interrupting) Now, Judge, that take us down to — Do you want to introduce this with Delta Drilling Company now?

MR. RAMEY, SR.: Yes.

We also introduce the Delta Drilling Company assignment. And that stipulation covers that also.

THE COURT: I thought it covered all of them — all of them except the interest owned by, if any, the McCoys, and the Hiltons and the Meltons — with the Atlantic Refining Company. Is that right?

MR. MOORE: Yes, sir; we are willing to stipulate that they are claiming non-participating royalty interest in — that are the subject of the former deeds that Judge Ramey introduced.

MR. RAMEY, SR: That Delta Drilling Company also owns a non-participating royalty interest in it — in the land in the controversy. Is that stipulated?

THE COURT: I understood that. So, let's get it straight; that the attorneys for the Plaintiffs are willing to stipulate

that all persons listed in Paragraph 2 of their Motion to Remand as being necessary and indispensable parties to this case own, or claim to own, non-participating royalty interest under the lands involved in this case with the exception of W. O. Hilton and wife, L. A. McCoy and wife, J. W. Melton and wife, and The Atlantic Refining Company.

MR. MOORE: Yes, sir.

THE COURT: All right; that takes care of it.

MR. RAMEY, SR.: On the form that — the form of the instruments that have been —

THE COURT: (interrupting) — heretofore introduced in evidence.

MR RAMEY, SR.: (continuing) — heretofore introduced in evidence.

THE COURT: Has there been — Has the lease from the Meltons been introduced in evidence? I notice —

MR. RAMEY, SR.: (interrupting) No, it hasn't, Your Honor.

THE COURT: I know it's included in the unitization agreement.

MR. RAMEY, SR.: We will offer that now.

MR. McCLENDON: Here's the lease, Judge.

REPORTER'S NOTE: An instrument was handed to Mr. Ramey, Sr., Counsel for the Defendant.

(OIL, GAS AND MINERAL LEASE — between J. W. Melton and wife, Virgie Melton, and B. L. Garrett, dated August 5, 1951, filed of record on August 28, 1951 and recorded in Volume 372, page 415, Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 32)

(ASSIGNMENT OF OIL AND GAS LEASE — from B. L. Garrett to E. C. Casey, dated August 6, 1951, filed of record on August 28, 1951, and recorded in Volume 414, at page 372, in the Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 33)

(ASSIGNMENT OF OIL, GAS AND MINERAL LEASE — from E. C. Casey to Atlantic Refining Company, dated August 7, 1951, filed of record on August 28, 1951, and recorded in Volume 373, at page 270 of the Deed Records of Henderson County, Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 34)

CLERK OF THE COURT: That will be "D-32" — and the two assignments will be "33" and "34".

MR. RAMEY, SR.: We offer the lease from J. W. Melton to B. L. Garrett, dated the 5th day of August, 1951, recorded in Volume 372, page 415, Deed Records, Henderson County, Texas, being identified by Defendant's Exhibit No. 32.

And we offer the assignment of said lease from B. L. Garrett to E. C. Casey, dated August the 6th, 1951, recorded in Volume 414, page 372, Deed Records, Henderson County, Texas, being identified as — by Defendant's Exhibit 33.

And we offer a — an assignment from E. C. Casey to Atlantic Refining Company, dated August the 7th, 1951,

recorded in Volume 373, page 270, being identified by Defendant's Exhibit —

What is that?

CLERK OF THE COURT: "34".

MR. RAMEY, SR.: (continuing) — 34.

(pause).

Shall we proceed, Your Honor?

THE COURT: Yes. Yes; go ahead.

MR. RAMEY, SR.: Will you come around, Mr. Biard.

REPORTER'S NOTE: Mr. D. J. Biard was duly sworn as a witness.

D. J. BIARD,

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. RAMEY, SR.:

"Q. State your name, please, sir.

"A. D. J. Biard.

"Q. Are you commonly referred to as Jack Biard?

"A. Yes, sir.

"Q. Where do you live, Mr. Biard?

"A. I live on Timberlane Street in Tyler.

"Q. How long have you lived here?

"A. Four and one-half years.

"Q. Are you connected with the Atlantic Refining Company?

"A. Yes, sir.

"Q. What is your connection with the Atlantic Refining Company?

"A. I'm the District Landman for the Atlantic Refining Company in the East Texas District.

"Q. Are you in charge of the Tyler Office of the Atlantic Refining Company in that capacity?

"A. In that capacity; yes.

"Q. Are you familiar with the lease that the Atlantic Refining Company has pertaining to the land owned by the Plaintiffs, W. O. Hilton and wife, Malvirin Hilton, and L. A. McCoy and wife, Ila Mae McCoy?

"A. I have read the instrument. I am familiar with it; yes.

"Q. Do you recognize this instrument as being in your files pertaining to that property?

REPORTER'S NOTE: An instrument was handed to the witness.

"A. Yes, sir; this is a portion of the file on that lease.

REPORTER'S NOTE: An instrument was handed to Counsel for the Plaintiffs.

(pause)

* * * * *

THE COURT: Well, now, I have no intention — I hope nobody understood that I was trying this case on its merits. I was only going in far enough to the point where the Court could determine who were indispensable parties; and the Court have all held that is not the point to determine indispensable parties.

MR. RAMEY, SR.: I'm aware of that.

THE COURT: And I see no need for trying the case on its merits until I decide the question of indispensable parties. And I can't see where this has any bearing on that question.

MR. RAMEY, SR.: Well —

THE COURT: (interrupting) You are trying to prove that the lease is valid. He is —

MR. RAMEY, SR.: (interrupting) Well —

THE COURT: (interrupting) if you take his pleadings — I — I assume, it, as, and if ever I get to the point where I can ask the parties about — when we get down to it — I assume he is going to contend that you don't have a valid lease on the east eighty acres there, and, therefore, you had no right to put it in the unit.

He is seeking to cancel the Declaration of Unit, is what he is seeking, by his pleadings.

MR. RAMEY, SR.: Well, he is seeking by these pleadings to attack the validity of the lease; and we want to show that the lease is in force.

THE COURT: Now, you certainly would have that right on the trial on the merits; but the Court can't try this case on the merits and then look back to see who should be indispensable parties.

Certainly, nobody can be heard in this case if the Court finds for you. These parties wouldn't have to be here. But the courts have said that's not the test. We've got to assume that he might win his lawsuit and determine the question of indispensable parties.

MR. RAMEY, SR.: I was going to get to that. But I thought that in view of these royalty deeds that they were — were, by the expressed terms, dependent upon the continuation of the lease in effect.

THE COURT: Well, the lease is in effect. You have already proven that. You've got a producing well on it, which will hold it as long as that well produces — if I read the royalty deeds correctly. It would hold the royalty.

MR. RAMEY, SR.: Well, I — I think you are — the Court is correct in that. I was just going to try to —

THE COURT: (interrupting) Well, what I'm saying is that, regardless, the Court cannot at this stage decide whether the lease is valid or whether it is void.

MR. RAMEY, SR.: Well, we —

THE COURT: (interrupting) I'm just trying to see how the parties are cast and what the issues are going to be, to see whether it is a case in which I can grant the relief without affecting somebody that is not before this Court. And I must assume, for that purpose, that he would win his lawsuit and would be entitled to relief.

MR. RAMEY, SR.: Yes.

THE COURT: And that's —

MR. RAMEY, SR.: Yes, that's — (interrupting)

THE COURT: (continuing) — I would think we have gone far enough. I don't see where this has anything to do with that point.

It certainly could well have a bearing on the merits. I can well see that — if we reach the merits.

MR. RAMEY, SR.: Well, I —

THE COURT: (interrupting) Well, we are just going to have to try it all over again if the Court decides that I can keep the case here. If the Court decides that I can keep the case here, we will just have to try it all over again.

If there is anything else you think you need to do, Judge Ramey to — to see who the indispensable parties are in this case—

MR. RAMEY, SR.: (interrupting) Yes, I do — by this witness.

THE COURT: All right.

BY MR. RAMEY, SR.:

"Q. Is the land that is—Plaintiff's land, as we have described it by Mr.—in this plat (indicating) as being described by Mr. Daugherty—and the Melton tract—are they situated in what is known as the Fairway Field?

"A. Yes, sir.

"Q. Of Henderson County, Texas?

"A. Yes, sir.

"Q. They are?

"A. Yes.

"Q. Is that in an—in an established producing oil producing area?

"A. Yes, sir; it is.

"Q. Are there producing wells all around those tracts of land?

"A. Yes, sir; there are producing wells completely surrounding the unit.

"Q. The unit—What do you mean by "the unit"?

"A. The parcel of land—That one hundred and sixty-acre parcel of land that is described in the Declaration of Unit for the Melton unit, which has heretofore been introduced in evidence.

"Q. What land—What leases do they comprise?

"A. There were two leases recited in and pooled by the Declaration of Unit: one was the Melton Lease—eighty acres out of the Melton Lease — and the other lease was the W. O. Hilton, et al, Lease — eighty acres out of that lease.

"Q. Are all of the lands adjacent to the Melton Lease and the Hilton Lease already unitized?

"A. Yes, sir; they are completely unitized.

"Q. Are there any other lands in that area, or the immediate vicinity, that have not been unitized or pooled?

"A. No, sir; there is no such land.

"Q. What do you—

I have introduced the Railroad Commission orders for unitization in that field. What do you—Do you understand that the units prescribed by the Railroad Commission are a minimum of eighty acres and a maximum of one hundred and sixty acres in that field?

"A. Yes, sir.

MR. RAMEY, SR.: May I confer with Counsel?

THE COURT: All right.

I don't know whether it's come out yet or not.

I assume that that well producing on the unit in question is producing from the James Lime—

THE WITNESS: (interrupting) Yes, sir.

THE COURT: (continuing) —formation?

THE WITNESS: Yes, sir.

REPORTER'S NOTE: Counsel here conferred out of the hearing of the Court Reporter.

MR. RAMEY, SR.: It is stipulated between counsel that the permissible allowable under the rules and regulations of the Railroad Commission is two hundred and twenty-two barrels per day for eighty acres and fifty percent more, or a total of three hundred and thirty-three barrels, per day for one hundred and sixty acres.

MR. MOORE: That's my understanding of the rule. Mr. Biard probably knows better than I do.

THE COURT: Eight days a month?

MR. MOORE: Yes, sir.

THE WITNESS: Yes, sir.

THE COURT: They are under the eight-day-a-month rule?

MR. MOORE: Yes, sir.

* * * * *

MR. RAMEY, SR.: That's all.

CROSS-EXAMINATION

BY MR. MOORE:

* * * * *

BY MR. MOORE:

"Q. Now, as far as the geology of the areas goes—say that the land were not released for ten years—wouldn't they lose a part of the royalty that they are entitled to over that ten years?

"A. The non-participating royalty owners?

"Q. Yes, sir.

If the lease is cancelled. Aren't they going to be drained?

"A. It's—Well—

MR. RAMEY, SR.: That's—

"A. (continuing) Yes, sir; it will be drained.

MR. RAMEY, SR.: We object to that. That's a conclusion of—

THE COURT: Well, I think he's entitled to ask him for conclusions too; because you asked him about a situation—if he—if they would be hurt—and he said no.

Overrule your objection.

Go on.

"A. (continuing) The tract itself, insofar as it was not in a producing unit, nor did it have a well on it, would almost certainly be drained.

BY MR. MOORE:

"Q. Then that is a way in which probably those non-participating royalty owners could be injured; isn't it—if the lease is cancelled?

"A. The thing that's going through my mind here, if you will permit me to say it, is that I have some question as to whether non-participating royalty owners have what you refer to as a right to demand and secure development. And to that extent, I don't know—

"Q. Well—

"A. (interrupting) Surely the mineral owners would be drained.

"Q. I'm not asking you about their right to demand development.

The situation as it is now, as I understand it, is that they have a royalty interest in a producing unit—and as long as that lease is vaild they are supposed to be able to collect so much money every month.

"A. They have been—

"Q. (interrupting) Now, if their lease is declared invalid, they are not going to collect that money; are they, sir?

"A. Well, the lease under which they claim under—

No, no; they would not be entitled to collect the money, or, at least—

Well, now, wait.

(pause)

Some of them have ratified the—the Hilton Lease, of course.

"Q. Yes, sir; but if they have an interest under this eighty acres right here (indicating), and your lease is cancelled, and all you've got is the eighty acres over here (indicating) to get an allowable on, how are you going to pay these people over here (indicating) any royalty?

"A. Well, that's a question of law as to whether or not they would be overloaded or not. It's possible that —

"Q. (interrupting) Well, would you want to pay them a royalty if they didn't own any interest under this?

"A. There is no economic incentive for paying them royalty, but it is possible that you would be obligated to do it by virtue of the arrangements entered into with them.

"Q. Then, if they are —

"A. (interrupting) I leave that —

"Q. (continuing) — going to collect it — if they are not entitled to collect it, they are going to be entitled to collect it under some kind of contract — and you said they ratified this — but, still, isn't their interest going to be reduced because it's only going to be producing on an eighty acre allowable instead of a hundred and sixty acre allowable?

You have eighty acres revolving interest over here now (indicating). Now, if you put some more in here you are going to reduce everyone; aren't you?

"A. They are spread out, so to speak, under the unit.

(pause)

Of course, in addition to their rights — whether or not they exist with respect to the Melton unit by virtue of contract, they still have, presumably, rights under — in and to the production that may be secured from the so-called Hilton tract over here (indicating).

"Q. Yes, sir; but if — if — if there is no longer any production coming from the Hilton tract — if you don't have a lease on this, you certainly can't pay — you can't from an economic standpoint pay these royalty owners royalties in addition to the royalty you are paying over here (indicating); can you?

"A. Probably could afford it; but it would be a drain, of course.

"Q. You wouldn't want to; would you?

"A. I wouldn't do it voluntarily.

MR. MOORE: Your Honor, I think that's all. I don't want to argue with the witness.

REDIRECT EXAMINATION

BY MR. RAMEY, SR.:

"Q. If those — If this lease is in the proven area would its — would that lease, if it — if the Plaintiffs prevail in this lawsuit — have a market demand?

"A: There would be a tremendous interest in — on behalf of oil operators — oil companies to secure a lease on the tract and drill it; yes, sir.

"Q. What would you say would be the market value of this eighty acres of the Hilton tract if it were —

THE COURT: (interrupting) Well, now, the royalty owners wouldn't get any of that.

MR. RAMEY, SR.: No, they —

THE COURT: (interrupting) They are all non-participating.

MR. RAMEY, SR.: I'm — I'm asking this question to show that there is not any likelihood of there not being any development for — during the next ten years if — if this lease was cancelled, Your Honor; that there would be a great incentive for the Hiltons and McCoys to lease the land.

But Counsel's interrogation indicated — it was predicated on the assumption that they would just sit back and not lease their land during the next ten years duration of these term royalty conveyances.

"A. Naturally, I would have to guess — I would have to guess at something like that because the situation has not confronted me; but I would imagine that something like that would command a price of — lease bonus price of in excess of a thousand dollars an acre. That's my personal opinion.

BY MR. RAMEY, SR.:

"Q. You deal with those matters every day in your — in your capacity; don't you?

"A. Yes, sir.

MR. RAMEY, SR.: That's all.

THE COURT: How long has that well been in there on that lease?

THE WITNESS: This well was completed on June 20, 1961, and commenced producing, I think, on the 25th of June, 1961.

THE COURT: It's been producing ever since?

THE WITNESS: Yes, sir.

THE COURT: Full allowable?

THE WITNESS: Yes, sir.

THE COURT: Have the royalty owners holding royalty under the Hilton eighty-acre tract been paid their royalty?

THE WITNESS: They have been tendered division orders. I do not know whether they have all signed returns. In fact, I think there have been some that have not signed returns. returns.

THE COURT: You wouldn't think that the Atlantic would pay them if this lease was cancelled, would you?

THE WITNESS: No, sir. That would be a question —

THE COURT: — wouldn't be obligated to?

THE WITNESS: I should hope not.

MR. RAMEY, SR.: I would —

THE COURT: (interrupting) Of course, there is no well on the Hilton eighty-acre tract? at this time?

THE WITNESS: No, sir.

THE COURT: All right.

MR. MOORE: Your Honor, I have just one or two further questions of the witness.

RECROSS-EXAMINATION

BY MR. MOORE:

"Q. Mr. Biard, are there present plans to have a field-wide unit in the James Lime formation down there?

"A. Leaseholders have held a series of meetings — the object of which, and hope and intent of which, is to create a field-wide unit for the James Lime formation; yes, sir.

"Q. Don't they hope to have that done in the next two or three years?

"A. That is my definite impression; yes, sir.

"Q. All right.

Now, when that field-wide unit is formed what is going to be the position of a man with a tract of land if it's not leased down there — inside the field-wide unit?

"A. A mineral owner would be an operator in that case.

"Q. All right.

Well, won't — isn't there then a very great likelihood that someone might prefer not to lease that eighty-acre tract and save it until the field-wide unit is formed — and command a much, much, much higher price than maybe a thousand dollars for it?

(pause)

"A. The mechanics of the formula under which allowables will be prorated among the tracts has not been agreed upon by either the operators or the royalty owners, nor have the mechanics of admitting tracts to the unit upon which no well has been drilled.

Those — Those things simply have not been negotiated as yet.

"Q. Well, hasn't it been your experience in other areas that when a field-wide unit is formed someone that is in the middle of the unit with an unleased tract of land is in a rather commanding position?

"A. I'd say —

"Q. (interrupting) If he wants to join the unit?

"A. I really — I don't recall having seen that situation where you have a tract of land upon which no fraction of the mineral interest was leased.

"Q. Well —

"A. (interrupting) It's just a novel situation.

"Q. All right; don't you think it's reasonable to suppose that someone might hold it two or three years just hoping it might be worth lots more — especially if they didn't have any — any royalty interest in it?

Say, for instance, that the person that owns the lease right on this thing doesn't have but one or two acres of that eighty of royalty interest. All he can do is hold it and try to get a big bonus for it some day — or get a —

I mean, he can't — he's — his interests are absolutely adverse to a man who has a lot of non-participating royalty down there — trying to lease this land or try to hold it and try to go into a field-wide unit —

MR. RAMEY, SR.: (interrupting) That calls for a question of law, Your Honor.

THE COURT: Yes; I will —

MR. MOORE: (interrupting) Yes.

All right; I will withdraw the question, Your Honor.

That's all.

THE COURT: Judge, you mentioned a regulation that has not been introduced in evidence here — of wells completed as of May of this year. I believe you had —

MR. RAMEY, SR.: (interrupting) I was going into that, Your Honor, if you hadn't objected to my —

THE COURT: (interrupting) Now, Mr. Ramey, I made no objection to what you said about that; and I don't want that insinuation. Because if there is a change in the regulations, that is material on whether or not they would be hurt —and I haven't tried to stop you one minute to prove anything here that would bear on the issue.

My question of a while ago was directed at whether the line of testimony you were going to proceed — whether it bore on the issue — and it was solely on the merits.

MR. RAMEY, SR.: Your Honor, didn't let me finish my sentence. I was going to say that you objected to my going into the matter that you did object to —

THE COURT: (interrupting) On payment of the rentals — delay rentals. That's — That's the only thing I brought up; that was brought up.

REDIRECT EXAMINATION

BY MR. RAMEY, SR.:

"Q. Do you have your records about when this well was commenced on the Melton tract, Mr. —

"A. I have some notes in the courtroom here upon which I have noted those dates; yes, sir.

REPORTER'S NOTE: Instruments were handed to the witness.

"A. Shall I refer to them?

MR. RAMEY, SR.: With the Court permission?

THE COURT: Go ahead.

I asked him when the well was completed, and he gave that answer a while ago.

THE WITNESS: I know the date. I —

MR. RAMEY, SR.: (interrupting) He's got it, Your Honor.

THE COURT: All right. He didn't tell me he guessed at it. I didn't ask him he was guessing.

THE WITNESS: No; I wasn't guessing. I have it written —

THE COURT: (interrupting) All right; tell me again.

It was June something; wasn't it?

THE WITNESS: Yes, sir; it was completed in June; yes, sir.

The well was spudded on April 30, 1961 — completed on June 8, 1961.

MR. RAMEY, SR.: June 8th is the date he didn't say.

THE WITNESS: And the connection date was June 20th. And the first run was June 25th.

* * * * *

THE COURT: Does the Plaintiff still want to urge his Motion to Dismiss?

MR. MOORE: No, sir.; with leave of the Court, we would like to withdraw our Motion to Dismiss at this time.

THE COURT: All right.

All right; does the Plaintiff have any further evidence on the matter before the Court now — on the Motion to Remand? Really, it's a question of who are indispensable parties, if any, in the case.

MR. MOORE: No, sir; the Plaintiffs rest.

THE COURT: All right; I will hear from you gentlemen then. I will hear from the Plaintiff first.

* * * * *

MR. MOORE: Your Honor, it is the Plaintiffs' position in this case simply that this is a suit to cancel the declaration of unit. If the declaration of unit falls, of course the lease falls — being a lease with a ten-year primary term and being dated in August — August the 5th, 1951. The lease is no longer in effect if the declaration of unit is no good.

THE COURT: Of course, then your basic contention that the declaration is no good is that the lease never covered this property from the start. Is that it?

* * * * *

MR. MOORE: Yes, sir; that's correct.

THE COURT: All right.

* * * * *

REPORTER'S NOTE: The Court then, at 5:20 o'clock, p.m., June 26, 1962, recessed until 10:00 o'clock, a.m., June 27, 1962, at which time it reconvened.

* * * * *

THE COURT: So, under the peculiar facts of this case, I am going to hold, and do so hold and conclude, that the royalty owners under the Hilton tract and the royalty owners under the Melton tract are not indispensable parties.

Therefore, the Plaintiff's Motion to Remand this case to a State court will be overruled; and the attorneys for the Defendant will prepare and present an appropriate form of order to that effect.

* * * * *

THE COURT: Gentlemen, I am going to set the pre-trial hearing on this case for July the 26th at 10:00 o'clock, a.m.

Now, that will be in accordance with the usual order that is sent out; but you can get a copy from the Clerk — which requires the attorneys to confer and attempt and to make such stipulations as they can — and be here with an attempt to have an agreed pre-trial order. If you can't, why, each one will have their own order prepared.

So you've got plenty of time to do that between now and July the 26th, if I'm looking — Wait a minute. Let me see if I'm looking at the right week.

(pause)

Yes, that's Thursday, July 26th. I should be through with the criminal case I have set for trial for Monday of that week by Thursday.

All right, Gentlemen, the Court stands recessed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

OFFICIAL REPORTER'S CERTIFICATE

I, David M. Seyffert, Official Court Reporter for the District Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing 235 pages of typewriting constitute a true, correct and complete transcript of the hearing held on Plaintiffs' Motion to Remand in the above-styled and numbered civil cause.

WITNESS my official signature in the City of Tyler, Texas, this *20th* day of *December, 1962.*

David M. Seyffert
Official Court Reporter
United States District Court
Eastern District of Texas

CERTIFICATE OF SERVICE

This certifies that copies of this Appendix have been served upon counsel of record for Petitioners by enclosing copies in sealed envelopes and depositing same in the United States Post Office at Dallas, Texas, with first-class postage prepaid and sent by Certified mail, and addressed to counsel of record at their post office addresses as follows:

Jack W. Flock,
Tom B. Ramey, Jr.,
Frank L. McClendon
Citizens First National Bank
Building
P. O. Box 629
Tyler, Texas 75701

Dated this 13th day of September, 1969.

Edward Kliewer, Jr.

Edward Kliewer, Jr.
Attorney for Respondents